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Articles

Title to the Aouzou Strip: A Legal and Historical Analysis

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I. INTRODUCTION

The trails of history are rarely as perversely scrambled as in that violently contested pivotal zone linking the Libyan desert with Chadian Tibesti: to the complexity of the forces that fashioned this space . . . is added the temptation to call the facts into play in one sense or another according to the preferences of the observer, the pressures of the event of the moment, [and] the ideological purpose.¹

In August 1987, the armed forces of Chad swept across vast stretches of desert in a series of lightning strikes that shattered an occupying Libyan army and drove it from the northern third of Chad. This operation briefly captured the Aouzou Strip, an obscure piece of territory in the northernmost part of the area, but Libyan forces recaptured it shortly afterward in a campaign marked by unusually heavy and intense fighting. Although the two states agreed to a cease-fire the following month, they have continued to dispute title to the territory, and in September 1990, they brought the matter to the International Court of Justice (I.C.J. or Court).

The Aouzou Strip runs along the border between Libya and Chad for a distance of some six hundred miles, varying in width between fifty and ninety miles. Although roughly the size of Scotland, it has a population of only a few thousand and contains some of the most barren land on the face of the earth.

1. René Lemarchand, *A propos du Tchad: la face nord face à l'histoire*, 12 MAGHREB REV. 18, 18 (1987) [hereinafter Lemarchand, *A propos du Tchad*].

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Why, then, have Chad and Libya fought so bitterly for its possession? Some commentators have suggested that the two countries really seek to control the area's reportedly vast mineral wealth, particularly the uranium deposits believed to lie there. Although that explanation may capture some of the reasons for the dispute, it is incomplete. If the dispute concerned only access to resources, Libya and Chad might have negotiated a settlement. Furthermore, Libya has displayed an interest in the area since its independence, before geologists even suspected the possibility of mineral deposits in the region.

A better explanation for the persistence of the dispute looks to the parties' beliefs. Each state genuinely believes that it owns the Aouzou Strip. The predecessors of Libya and Chad in the area put forth competing claims to the Aouzou Strip at least as early as 1890, and those claims reverberate in the arguments of Libya and Chad today. Each feels strongly that the disputed land forms, and throughout history has formed, an integral part of its national territory and its national identity. This makes the dispute as much a matter of principle as a matter of land. Because each state links the territory to its national identity, neither state will compromise its claim.

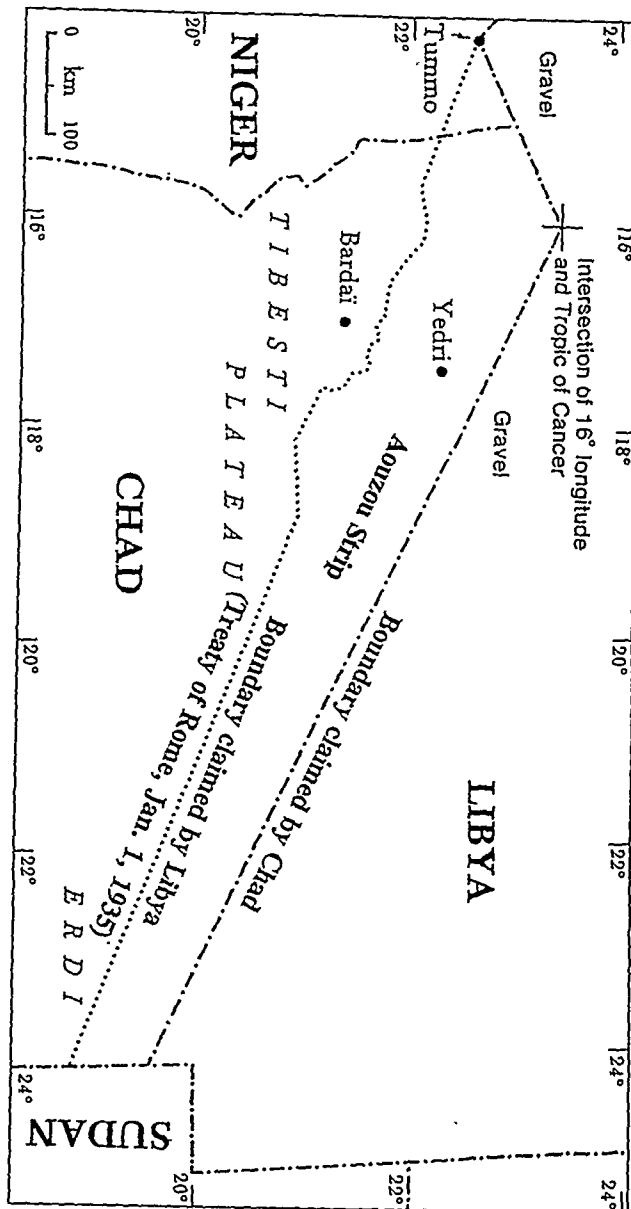
Chad, as a former French colony and thus the successor of France, claims title to the area through a combination of French occupation and a series of international treaties that recognize France's rights to the area. France administered the Aouzou Strip as part of French Equatorial Africa, the colonial entity from which Chad emerged at its independence in 1960. Chad also invokes a 1955 treaty between France and Libya in which Libya accepted the boundary Chad now claims. Consequently, the boundary that Chad claims is the boundary to which it acceded at its independence.

Libya asserts title to the Aouzou Strip as a result of the historical interaction between the people of the area and Libya. In particular, the Libyans feel that since the Ottoman period and even before it, the Aouzou Strip area has been joined with Libya in one cohesive entity—the Islamic state. This state created political structures that addressed the physical realities of the North African milieu. Because the great distances involved made effective political control of the interior difficult, the system based sovereignty on the recognition of "some overriding hegemony, based on religious or cultural associations."² "The crucial feature of the precolonial situation was that political authority was expressed through communal links."³ The intensity of that authority depended on tradition, geographic location, and political relationships.⁴

2. George Joffé, *Frontiers in North Africa*, in *BOUNDARIES AND STATE TERRITORY IN THE MIDDLE EAST AND NORTH AFRICA* 24, 27 (G.H. Blake and R.N. Schofield eds., 1987); see also ABDOL BA ET AL., *L'ORGANISATION DE L'UNITÉ AFRICAINE* 122 (1984).

3. Joffé, *supra* note 2, at 27 (stating that precolonial African concept of boundary was flexible and mobile, following populations; territory viewed as "the territory of the ethnic group . . . an ethnic property, cultivated, exploited by families and not individuals").

4. *Id.* at 26.



Map 1: The Aouzou Strip

IAN BROWNLIE, *AFRICAN BOUNDARIES: A LEGAL AND DIPLOMATIC ENCYCLOPEDIA* 122 (1979) (reprinted with permission).

Libya asserts that the people of the area have always enjoyed close ties to Libya and that Libyans have always perceived the Aouzou Strip area as part of Libya. During the Ottoman period, particularly in its waning years, the authorities in Tripoli took several measures to strengthen their ties to the region. The area also came under the influence of the Sanusiya, a Muslim religious brotherhood based in the Libyan province of Cyrenaica.

Each state thus has valid reasons to believe that the Aouzou Strip has historically formed an essential part of its national territory. But how can the same territory have belonged to two different states at the same time? This question highlights fundamental conflicts that underlie many of the boundary disputes in Africa today. Libya invokes the precolonial status quo as a basis for title, arguing that the Aouzou Strip should revert to its possessor at the moment of European colonization. Chad bases its claims on the possession of the colonial state, France. The dispute thus pits the norm of decolonization, enshrined in several United Nations resolutions, against the principle of *uti possidetis* (from the Latin phrase *Uti possidetis, Ita possidetis*, meaning "as you possess, so you may possess"), a doctrine that arose from the practice of states and that has been enshrined in fundamental documents of the Organization of African Unity.

The dispute also draws attention to the tension between two competing concepts of sovereignty. Chad bases its claims on traditional Western theories of sovereignty. It argues that France's occupation occurred in a region where no state possessed prior sovereign rights, that France exercised sovereignty to a degree sufficient to confer title, and that the actions of the Ottoman Empire and the Sanusi did not satisfy the traditional test of sovereignty because they did not display sufficient state authority over the region.

Libya can be expected to argue to the I.C.J. that the Western concept of sovereignty arose in a political system completely different from that prevailing in the Sahara, and that the attempt to apply those Western notions to the Sahara and the actions of the Turks there is inappropriate and invalid. Libya will, in all likelihood, urge the Court to consider and apply the notion of sovereignty that prevailed in the Sahara and to take account of the methods by which the Ottoman state displayed authority over peoples—methods that differed greatly from those used by Europeans. The I.C.J. essentially rejected these arguments in the famous *Western Sahara* case,⁵ in which Morocco based its claim on such arguments, in favor of the traditional Western notion of sovereignty. The Libyan claims will give the Court the opportunity to reconsider that holding.

Consequently, the Aouzou Strip dispute has a significance for Africa that is out of all proportion to the importance of the territory itself. The case squarely presents the Court with a clash of several legal principles. Will the

5. *Western Sahara*, 1975 I.C.J. 12 (Oct. 16).

Court recognize the African practice of resorting to *uti possidetis* instead of the decolonization norm? Will it confirm its precedent favoring the application of the Western, rather than indigenous, notions of sovereignty?

The present system has produced stability in African boundaries. It has failed, however, to satisfy genuine beliefs of title, such as Libya's, that rest on notions of sovereignty that Western law traditionally has not appreciated or accommodated. Consequently, the manner in which the Court resolves this conflict will have potentially far-reaching implications for Africa and for boundary law in general.

* * *

The nature of the territory and its inhabitants further complicates the dispute by raising the question whether a non-arbitrary boundary can even be drawn. The terrain of North Africa does not lend itself easily to rigid boundaries, and the populations living there have no notion of geographical lines separating peoples. The concept of a boundary is "borrowed from the mental universe of the West."⁶ Such a notion, with its connotations of certitude and definiteness, is "completely foreign" to the Sahara, "an area where the needs of commerce, transhumance, raids and nomadization [are] largely incompatible with the notion of a boundary."⁷ In fact, the semi-nomadic inhabitants of the Aouzou Strip, the Toubous, occupy a much larger area that stretches well to the north of the disputed territory into Libya and well to the south into Chad. No boundary could keep the Toubous together without tearing enormous areas from either Libya or Chad.

The Libyan arguments further call into question the feasibility of a fixed boundary in this case. The enormous distances and the barrenness of the land will support only nomadic societies. Political control has been "correspondingly punctiform and, with increasing distance from the centres of political power . . . , ineffective."⁸ The system of political organization that arose in response to these conditions predicated sovereignty on control over people, not territory. The limits of a state were not clearly defined or marked, but fluctuated according to the movements of the people owing allegiance to the sovereign.⁹ Consequently, if Libya relies on arguments based on historical ties alone, it may not be able to claim a definite boundary.

Straight lines drawn between geographical coordinates, such as those that define the Aouzou Strip, obviously did not arise from the vague process of historical interaction between peoples. In fact, international agreements from the colonial era set the outlines of the territory. The northern line, claimed by Chad, derives from later interpretations of an 1899 declaration between Great

6. Lemarchand, *A propos du Tchad*, *supra* note 1, at 20.

7. *Id.*

8. Joffé, *supra* note 2, at 26.

9. *Id.* at 27.

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Britain and France. The southern line, claimed by Libya, arises from the 1935 Mussolini-Laval Accords between France and Italy.

Libya has invoked this latter agreement in the past to support its claims to the area, but relying on a treaty between two colonialist European states as a basis for a boundary seems inconsistent with its claims based on historical ties. The dispute presently before the I.C.J., however, does not specifically ask the Court to decide the ownership of the Aouzou Strip. Such a request would force the Court to decide a narrow question: which version of the boundary do the law and facts better support? Instead, the Application asks the Court to determine the course of the boundary between the two states. Such a broad request leaves the parties free to claim almost any boundary line and to advance any arguments they wish.

* * *

As a result of the nature of their Application to the Court, either party could invoke the norm of self-determination. Resolving the case under this principle would allow the inhabitants of the area to decide whether they want to be a part of either state or form their own state. Such a resolution would render the complicated legal and historical arguments irrelevant and would make the fate of the Aouzou Strip a matter for political, not judicial, settlement.

The principle of self-determination would do more than render legal arguments irrelevant. It would call into question the right of the I.C.J. to determine title to the Aouzou Strip at all. The Toubous, who form a homogeneous ethnic and cultural unit, have historically been isolated in their desert habitat and have displayed a strong spirit of independence. They have firmly resisted any exercise of sovereignty and authority, both from within their own society and from outside powers. In the past thirty years they have rebelled against domination by the ethnic groups of southern Chad and have fought against Libyan occupying forces. Thus, if they were asked to which state they preferred to belong, they might well answer "neither." In that case, the I.C.J. could not assign the Aouzou Strip to either Libya or Chad without violating the Toubous' right to self-determination.

However, the case has come before the I.C.J. in a way that does not permit the Court to avoid such an injustice. Libya and Chad agreed to have the Court adjudicate their claims and only their claims. The Toubous have not been consulted, and because they have no standing to appear before the Court, they cannot present their arguments. The case thus excludes the real party in interest from any effective role in its resolution.¹⁰

10. The same difficulty arose in the 1953 *Minquiers and Ecrehos* case, in which France and the United Kingdom asked the I.C.J. to decide which one of them possessed sovereignty over certain rocks and islets in the English Channel. *Minquiers and Ecrehos* (Fr. v. U.K.), 1953 I.C.J. 47, 53 (Nov. 17). Because the parties framed the issue as a choice between the two of them, they precluded the Court from considering

* * *

This article analyzes the Aouzou Strip dispute from several perspectives. Part II briefly describes the disputed area and its inhabitants. Part III examines the history of the area, especially the crucial period between 1900 and 1914 when France, the Ottoman Empire, and the Sanusi struggled to establish control over northern Chad. Part IV discusses the bodies of law upon which the parties may draw in framing their arguments. Part V analyzes the potential arguments for each side. Finally, Part VI concludes that Chad's arguments have the most support under current international law.

II. THE AOZOU STRIP AND ITS INHABITANTS

A. *The Geography of the Area*

The Aouzou Strip comprises approximately 42,000 square miles¹¹ of barren and arid land. It runs east by southeast for six hundred miles, from the eastern boundary of Niger to the western boundary of Sudan, at the twenty-fourth meridian of east longitude. It attains its greatest width, ninety miles, at the eighteenth meridian and tapers to approximately fifty miles at either end.¹²

Site of "some of the world's wildest scenery,"¹³ the Aouzou Strip is the northernmost part of the Chadian prefecture of Borku-Ennedi-Tibesti (B.E.T.), a vast desert region. B.E.T. contains forty-seven percent of Chad's area but only eighty thousand inhabitants, less than three percent of the Chadian population.¹⁴ Only a few thousand of these inhabitants, almost all belonging to various clans of the largely nomadic Toubou people, live in the Aouzou Strip itself.

B.E.T. contains the three subprefectures of (from west to east) Tibesti, Borku, and Ennedi. Tibesti is bordered to the north by Fazzan, a desert region of Libya; to the west by Bornu, in Niger; and to the south by the Chadian prefecture of Kanem, on the northern and eastern shores of Lake Chad. To the north of Borku and Ennedi lies more desert, with the oasis of Kufrah some 300 miles north of the Aouzou Strip; south of Borku is the prefecture of Batha; and south of Ennedi are Biltine and Ouadai, bordering on Darfur in Sudan.

whether the islets belonged to any other state, or to no state at all.

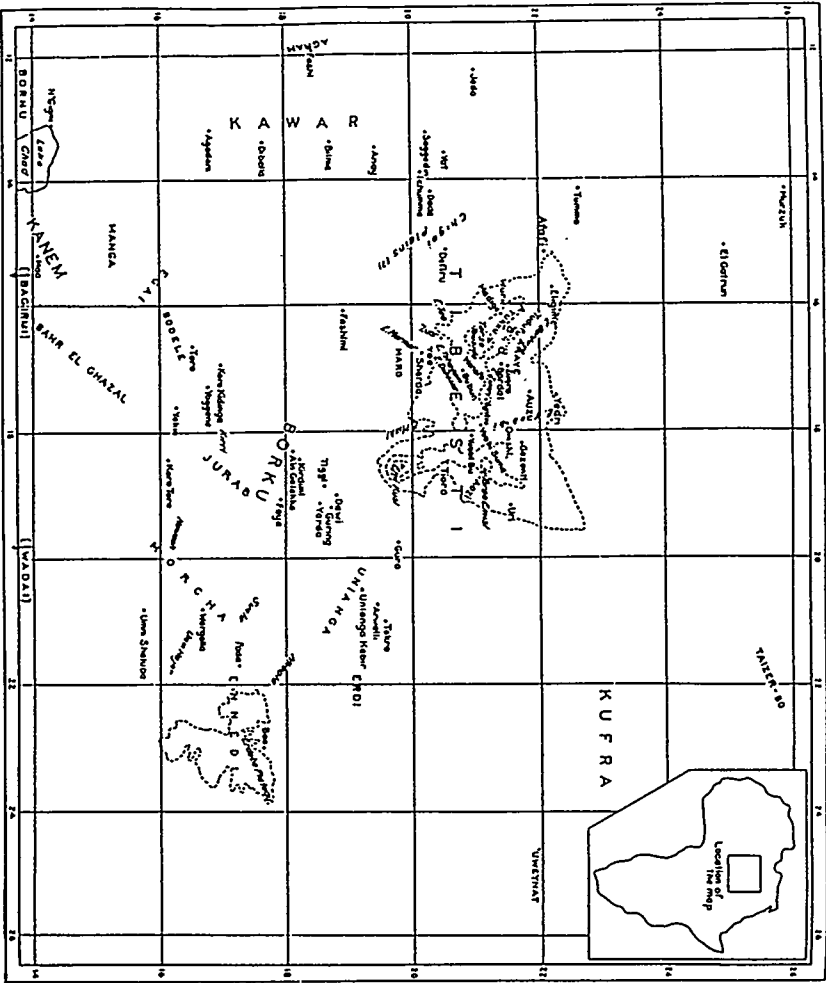
11. The figure is based on an estimate of 110,000 square kilometers. See BERNARD LANNE, *TCHAD-LIBYE: LA QUERELLE DES FRONTIÈRES* 151 (1982); Elio Comarin, *Tchad-Libye: A qui appartient la bande d'Aouzou?*, *JEUNE AFRIQUE*, Sept. 11, 1989, at 4, 4. Other estimates put the size of the disputed area at 37,000 square miles, approximately the size of Scotland. Peter Kellner, *Gaddafi Grabs Land in Uranium Hunt*, *SUNDAY TIMES* (London), Sept. 7, 1975, at 1.

12. These measurements are derived from IAN BROWNLIE, *AFRICAN BOUNDARIES: A LEGAL AND DIPLOMATIC ENCYCLOPEDIA* 122 (1979).

13. SAMUEL DECALO, *HISTORICAL DICTIONARY OF CHAD* 77 (2d ed. 1987).

14. *Id.* at xxiii, 76.

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Map 2: Map of the Toubou World
WALTER CLINE, THE TEDA OF TIBESTI, BORKU AND KAWAR IN THE EASTERN SAHARA 6 (Gen. Ser. in Anthro. No. 12, 1950) (reprinted with permission).

The western part of the Aouzou Strip encompasses the northern edge of the Tibesti massif, a mountainous region of basaltic rock that covers twice the area of the Pyrenees and has an average altitude of 6000 feet, with peaks as high as 11,000 feet. To the southwest, south, and east, the massif tapers gradually, but in the north it ends more abruptly. The terrain is extremely uneven, marked by long, deep valleys, ravines, craters, and plateaus. The area contains a number of wells, springs, and small oases.¹⁵ Although some of the massif lies within the Aouzou Strip, and a small part of it juts into Libya, most of it is undisputed Chadian territory. To the north of the massif stretches a vast flat, sandy plain, the Serir Tibesti.¹⁶ North of the Aouzou Strip the Libyan desert extends to the oases of al-Qatrun and Marzuq.

Immediately south and east of the massif lies Borku, a region characterized by gravelly outcrops, sandy and eroded plateaus, and a generally "chaotic" landscape¹⁷ whose barren aridity is broken by small lakes and by two lines of oases meeting at a right angle at Ain Galakka. The first line runs east by southeast approximately forty-six miles to Faya-Largeau, the capital of B.E.T.; the other runs northeast along the southeast edge of the Tibesti massif.¹⁸ To the west and northwest, as it approaches the massif, the land becomes harsher and more dry, ascending gradually in a series of enormous, flat plains of hard sand (*regs*) incapable of supporting human life.¹⁹ The more fertile southern regions of Borku, particularly Mortcha, Djourab, and Egueï, the so-called "Netherlands of Chad," contain pastures where numerous Toubou tribes drive their flocks during part of each year.²⁰

Southeast of Borku is Ennedi, containing the eastern edge of the Aouzou Strip. The Ennedi massif, smaller and lower than the Tibesti massif, comprises two plateaus separated by valleys running east and west. Especially in the north, the terrain has been sculpted by erosion, leaving a jumble of gorges, corridors, grottoes, and small plateaus (*erdis*).²¹ The south of Ennedi is a

15. JEAN CHAPELLE, *NOMADES NOIRS DU SAHARA: LES TOUBOUS* 41, 67-69 (1957) [hereinafter CHAPELLE, *NOMADES NOIRS*]; E.-F. GAUTIER, *SAHARA: THE GREAT DESERT* 161-62 (Dorothy Ford Mayhew trans., 1935).

16. See ARDITO DESIO, *IL TIBESTI NORD-ORIENTALE* 96 bis, 102-07 (1942); GAUTIER, *supra* note 15, at 62, 103.

17. CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 118.

18. LT. JEAN FERRANDI, *LE CENTRE-AFRICAÎN FRANÇAIS* 100-01 (1930); see also CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 121-22; WALTER CLINE, *THE TEDA OF TIBESTI, BORKU AND KAWAR IN THE EASTERN SAHARA* 26 (General Series in Anthropology No. 12, 1950).

19. CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 118; ALBERT LEROUVREUR, *SAHÉLIENS ET SAHARIENS DU TCHAD* 11 (1962); see also GAUTIER, *supra* note 15, at 39.

20. CLINE, *supra* note 18, at 32; GAUTIER, *supra* note 15, at 166.

21. GAUTIER, *supra* note 15, at 161-64; see also FERRANDI, *supra* note 18, at 205-06; LEROUVREUR, *supra* note 19, at 30-31. For an excellent description of the geography of Borku and Ennedi, see Lt. Jean Ferrandi, *Les oasis et les nomades du Sahara oriental*, *RENSEIGNEMENTS COLONIAUX*, Jan. 1910, at 3, 3-8 [hereinafter Ferrandi, *Les oasis et les nomades*].

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sahelian²² region, receiving regular if modest precipitation. Almost no rain falls beyond the huge Depression of Mourdi in the north, where a succession of smaller plateaus, the Erdis, rise above arid lands reaching to the Libyan desert, which extends from there as far as Kufrah.²³

The Aouzou Strip thus consists generally of extremely dry, rocky terrain, interrupted by occasional wells and oases and marked at either end by high ground. The area is inhospitable, and the vast Libyan regions immediately to the north are harsher still, utterly lacking in water.²⁴ Yet the Aouzou Strip, and the lands both north and south of it, support a distinct people: the Toubous.

B. *The Toubous*

The semi-nomadic Toubous inhabit an area stretching from Fazzan in Libya southwest to Bornu in northeastern Niger and southeast to Ennedi. They are also found in small pockets in regions further south: in Kanem as far as Lake Chad, and in northern Ouadai.²⁵ The Toubous presently migrate throughout the desert, and the scope of their wandering has varied over time. Despite their small numbers they have played crucial roles in the region. They have been described as "a constant and usually malign presence in mid-Sahara, endangering (yet never wholly severing) the always precarious communications between the two sides of the central desert."²⁶

1. *Area of Inhabitation and Origins*

Although the Toubous have spread over an enormous area—some 1.7 million square kilometers (653,000 square miles), approximately equal to the size of Libya²⁷—ninety percent of them live in Chad, and over ninety-five percent in former French territory.²⁸ Of a Toubou population estimated in 1957 at 195,000, B.E.T. accounted for approximately 46,000,²⁹ while less

22. The sahel is a transitional belt of semiarid grasslands running across North Africa between the Sahara to the north and the subtropical areas to the south.

23. CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 134; FERRANDI, *supra* note 18, at 205.

24. See Jean Ferrandi, *La vérité sur l'occupation turque au Borkou, dans le Tibesti et l'Ennedi*, 40 BULLETIN DU COMITÉ DE L'AFRIQUE FRANÇAISE [B.C.A.F.] 391, 397 (1930) [hereinafter Ferrandi, *La vérité*].

25. DECALO, *supra* note 13, at 314; see also John Wright, *Chad and Libya: Some Historical Connections*, 8 MAGHREB REV. 91 (1983) [hereinafter Wright, *Historical Connections*]; 1 GUSTAV NACHTIGAL, SAHARA AND SUDAN 209, 214-15 (Allan G.B. Fisher & Humphrey J. Fisher trans., 1974).

26. JOHN WRIGHT, LIBYA, CHAD AND THE CENTRAL SAHARA 20 (1989) [hereinafter WRIGHT, CENTRAL SAHARA].

27. *Id.*

28. CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 394.

29. Most estimates for the population of Tibesti fall between eight and twelve thousand, a figure that has not changed since Gustav Nachtigal visited the area in 1870. See, e.g., LLOYD CABOT BRIGGS, TRIBES

than two thousand lived in Libya, either in Kufrah or in the oases of Fazzan.³⁰ Within Fazzan the Toubous inhabit primarily the southern oases of al-Qatrun and Tajarhi.³¹ Until the seventeenth century the Toubous constituted a much greater part of the population of the Libyan desert than they do today; a series of invasions by Arab tribes from the north and then by Ottoman forces drove them from present Libyan territory.³²

While the Toubous have populated the eastern and central Sahara for centuries, anthropologists have not been able to identify their pre-ninth century origins. Although they share characteristics with Berber tribes, such as blood group patterns,³³ the languages of the two peoples do not seem to be related.³⁴ The Toubou language may be linked instead to the Kanuri languages spoken to the south.³⁵ Some observers, drawing inferences from the appearance of the Toubous, have compared them to Ethiopians.³⁶ Others, using physical and linguistic evidence, have suggested possible Egyptian origins.³⁷ A fourteenth-century Arab manuscript refers to the Toubous as "people of the Pharaoh,"³⁸ but this label, coming as late as it did, may refer only to their religion and not their origins.³⁹

2. Physical and Cultural Traits of the Toubou People

The Toubou physique presents a unique mixture of Caucasian and Negroid features.⁴⁰ Whereas other mixed races, such as the Moors or the Tuaregs of

OF THE SAHARA 167 (1960) (estimating 9,000-10,000 Teda in Tibesti); 1 NACHTIGAL, *supra* note 25, at 421-22 (estimating 6,000 Teda in northwest Tibesti and 5,000 in southeast Tibesti); Lt. Réquin, *Les clans Tedda du Tibesti* (pt. 1), 45 B.C.A.F. 55, 57 (1935) [hereinafter Réquin I] (estimating 8,000-10,000 Teda in Tibesti). But see J. d'Arbaumont, *Le Tibesti de le domaine Têda-Daza*, 16 BULLETIN DE L'INSTITUT FONDAMENTALE DE L'AFRIQUE NOIRE 255, 257 *et seq.* (1954) (reporting results of 1954 census that, although probably inaccurate, estimated 6,500 Teda in Tibesti).

30. CHAPELLE, NOMADES NOIRS, *supra* note 15, at 405-06; see also Lemarchand, *A propos du Tchad*, *supra* note 1, at 20. Approximately 5,500 Toubous lived in Niger. The rest lived in Chad, south of B.E.T. *Id.* The current estimated Toubou population of 200,000 is only slightly higher. WRIGHT, CENTRAL SAHARA, *supra* note 26, at 20.

31. See L'ANNE, *supra* note 11, at 153, 236; WRIGHT, CENTRAL SAHARA, *supra* note 26, at 22. The Toubous in these areas belong to clans whose primary territory is in B.E.T. See CHAPELLE, NOMADES NOIRS, *supra* note 15, at 98-99.

32. See *infra* notes 181-195 and accompanying text.

33. WRIGHT, CENTRAL SAHARA, *supra* note 26, at 18-19; see also DECALO, *supra* note 13, at 314; DESIO, *supra* note 16, at 150 (discussing opinion of one scholar that Toubous are "a branch of the great Hamitic root closer to the Mediterranean Berbers").

34. CHAPELLE, NOMADES NOIRS, *supra* note 15, at 10; see also BRIGGS, *supra* note 29, at 168; 1 HENRI CARBOU, LA RÉGION DU TCHAD ET DU OUADAI 116 (1912).

35. DECALO, *supra* note 13, at 314.

36. DESIO, *supra* note 16, at 149; see also CHAPELLE, NOMADES NOIRS, *supra* note 15, at 16.

37. See, e.g., 1 CARBOU, *supra* note 34, at 116-17; DECALO, *supra* note 13, at 314.

38. 1 CARBOU, *supra* note 34, at 116.

39. See *id.* at 117 n.2 (comments of René Basset). On the origins of the Toubous generally, see PIERRE BECK & GEN. PAUL HUARD, TIBESTI: CARREFOUR DE LA PRÉHISTOIRE SAHARIENNE 255-65 (1969).

40. See generally WRIGHT, CENTRAL SAHARA, *supra* note 26, at 18-19.

the central Sahara, tend to exhibit considerable physical diversity, Toubou appearance is surprisingly uniform. This evidence suggests an ancient mix, with time and isolation smoothing out variations.⁴¹ The typical Toubou has brown skin, curly hair, and a lanky build, including a shallow chest and narrow waist and hips.⁴² The Toubou face most clearly shows traits considered Caucasian: a long and straight nose, slightly thick lips, a prominent chin, a high forehead, and large cheekbones.⁴³

The Toubous as a group also display certain personality traits. They are self-interested and opportunistic, frequently switching sides in a conflict to adapt to changing circumstances.⁴⁴ They are "individualistic, contentious, resistant to all authority above the family and clan levels."⁴⁵ Their strong sense of honor leads to frequent blood feuds between families and clans.⁴⁶ Except in times of extreme crisis, this constant factiousness and self-interested behavior prevents the Toubous from achieving any form of cohesive organization. The Toubous lack "a sense of a true racial solidarity" and even "a political structure distantly comparable to that of a nation."⁴⁷ Western observers have deemed them "incapable, not only of cooperating all together in the execution of a given policy, but even of conceiving such a policy."⁴⁸

3. Social, Economic, and Political Organization

The Toubous, called Goranes by the Arab populations of Chad,⁴⁹ form two main groups, the Teda and the Daza, each of which speaks its own dialect.⁵⁰ The Teda inhabit Tibesti, where they are the only Toubou group,

41. See CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 11.

42. *Id.* at 11-12; see also DESIO, *supra* note 16, at 149.

43. CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 11; see also BECK & HUARD, *supra* note 39, at 57-58; BRIGGS, *supra* note 29, at 167-68; 1 NACHTIGAL, *supra* note 25, at 209.

44. See CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 17, 19.

45. VIRGINIA THOMPSON & RICHARD ADLOFF, *CONFLICT IN CHAD* 8 (1981).

46. JEAN CHAPELLE, *LE PEUPLE TCHADIEN* 167 (1980) [hereinafter CHAPELLE, *PEUPLE TCHADIEN*]; see also BRIGGS, *supra* note 29, at 172-73.

47. DESIO, *supra* note 16, at 152.

48. CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 38. See generally WRIGHT, *CENTRAL SAHARA*, *supra* note 26, at 19.

49. See FERRANDI, *supra* note 24, at 112.

50. The Toubous call themselves Tedagada ("those who speak Teda") and Dazagada ("those who speak Daza"). See DECALO, *supra* note 13, at 314. Goukouni Oueddei, the rebel leader and then briefly President of Chad until 1982, is a Teda; Hissène Habré, the man who overthrew him and governed Chad until deposed in November 1990, is a Daza. See René Lemarchand, *The Case of Chad*, in *THE GREEN AND THE BLACK: QADHAFI'S POLICIES IN AFRICA* 106, 116 (René Lemarchand ed., 1988) [hereinafter Lemarchand, *The Case*]; see also Comarin, *supra* note 11, at 5; Charles Lambelin, *Long Duel in Chadian Sun Tilts Toward Habré*, Reuters, Nov. 19, 1986, available in LEXIS, Nexis Library, Wires File; THOMPSON & ADLOFF, *supra* note 45, at 60. Idris Deby, Chad's President since late 1990, belongs to the Zaghawa tribe, which is sometimes classed with the Toubous due to linguistic similarities with the Teda dialect, but which is actually an Arab people related to the Berbers. See DECALO, *supra* note 13, at 335; Nicholas Kotch, *Chad's New President Promises New Dawn*, Reuters, Dec. 4, 1990, available in LEXIS, Nexis Library, Wires File; Paul Michaud, *Hissène Habré, Chad's Leader, Survives Coup Attempt, But . . .*, DEF. &

and Borku. They also inhabit the neighboring parts of Niger and Libya.⁵¹ They are "naturally attracted, both geographically and culturally, to the North," particularly Fazzan.⁵² The Daza, the larger group, constitute the dominant Toubou population in Borku (where they outnumber the Teda by more than three to one) and in Ennedi, but the great majority of them live further south in Kanem and Biltine.⁵³

Before examining Toubou organization, a note of caution is appropriate. All information on the Toubou society comes from the work of Western anthropologists. While many of them have studied the Toubous closely, they come to their topic with Western conceptions of social and political organization that may not fit the notions prevailing among their subjects. The corresponding Toubou conceptions may contain nuances or assumptions that elude their observers. Consequently, such studies may not reflect accurately the Toubous' perceptions of their own society. This point will assume special significance if the I.C.J. looks to native concepts of sovereignty in resolving the dispute, since the Western accounts may only poorly capture those concepts.

a. *The Impact of the Physical Surroundings: The Clan System*

The economic realities of the Sahara and the sahel divide the Toubous into sedentary and nomadic populations. In the Tibesti massif, the oases contain the only resources available: dates, nuts, small quantities of grain, and pastures for animals.⁵⁴ These conditions have permitted small populations to settle in the oases of that region, e.g., Bardaï, Zouar, and Aouzou. The same is true of the oases of Borku.⁵⁵ Where water is not plentiful enough to support sedentary life, however, the Toubou must rely on mobile resources—animals. As a result of the short rainy season and the scarcity of rainfall in the desert and the Sahel, the available pasture resources shift over the course of the year, and the herdsman must move with them.⁵⁶ The camel is the animal of choice in these conditions. It is able to walk slowly from one tuft of grass to the next, eating as it crosses the great distances involved. The camel is the primary herd animal found north of the sixteenth parallel—that is, in most of B.E.T.⁵⁷

FOREIGN AFF., May/June 1989, at 40.

51. DECALO, *supra* note 13, at 308; *see also* CHAPELLE, *PEUPLE TCHADIEN*, *supra* note 46, at 44.

52. Comarin, *supra* note 11, at 5.

53. DECALO, *supra* note 13, at 76, 108; *see also* CHAPELLE, *PEUPLE TCHADIEN*, *supra* note 46, at 44; WRIGHT, *CENTRAL SAHARA*, *supra* note 26, at 21.

54. CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 69-70.

55. CHAPELLE, *PEUPLE TCHADIEN*, *supra* note 46, at 88.

56. *Id.* at 88-89; *see also* CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 70-71 (describing annual cycle of migration).

57. CHAPELLE, *PEUPLE TCHADIEN*, *supra* note 46, at 90. *See generally* BECK & HUARD, *supra* note 39, at 100-05.

The camel comes with its benefits and its requirements. Its milk provides the nomad's primary source of nutrition. Hardier and better able to move in the desert than a horse, it makes an excellent mount and beast of burden, thus allowing the nomad to gain by trade what he cannot provide for himself.⁵⁸ The Toubous also use the camel to exploit the natural resources of their lands—dates, huge deposits of salt, and natron (sodium carbonate).⁵⁹ To care for camels, the nomadic herder must be able to find a secure place with the proper conditions. He must have regular access to water sources and room for his animals to roam unmolested.⁶⁰

Partially as a response to these exigencies, semi-nomadic Toubou society is loosely organized into clans. Clan membership helps guarantee access to needed resources through a system of recognized territorial rights, founded on links with a particular site. These rights generally do not confer exclusive use of a resource, such as a pasture or a well, but rather priority in use. Outside the mountainous areas, the Toubous recognize a clan's rights to an "area of traditional routes." These rights are not absolute—they may be challenged by other clans and modified.⁶¹ Limited individual rights do exist as a supplement to clan rights; families own gardens, and date palms belong to specific individuals.⁶²

The Toubou clans, whose members usually number in the hundreds and rarely exceed 1,000, do not fit the usual notion of a coherent social or political group united under a single leader and living or traveling together. "The clan system . . . permits neither a geographical nor a political classing of individuals. It gives only a genealogical and historical classing."⁶³ The clan has no chief in the traditional sense, as all male members are equals.⁶⁴ Moreover, the members of a clan are rarely united; instead, they are scattered over a wide area, with each family essentially independent. A single village or nomadic camp is likely to contain members of several clans.⁶⁵

An individual Toubou belongs to the clan of his or her father, even after marrying. In addition, each Toubou will incur a network of obligations owed to several clans through maternal relationships, marriage, and social interaction. Hierarchy is consequently impossible, and cohesion is temporary and

58. CHAPELLE, *PEUPLE TCHADIEN*, *supra* note 46, at 90.

59. *Id.* at 93; *see also* FERRANDI, *supra* note 18, at 108. Ferrandi noted an "incessant movement of nomads, going to look in Borku for dates and salt, and bringing butter, tanned skins, and meat"—all of which are, incidentally, derived from the camel. *Id.* at 105.

60. CHAPELLE, *PEUPLE TCHADIEN*, *supra* note 46, at 88.

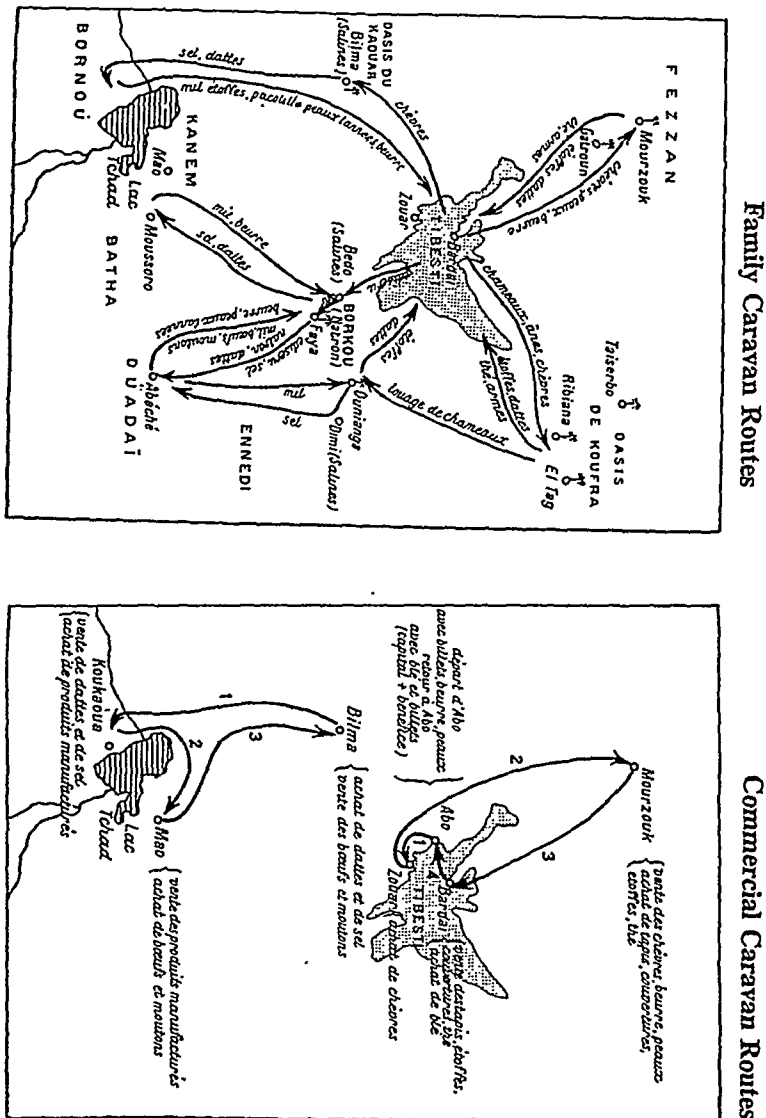
61. CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 367; *see also* CLINE, *supra* note 18, at 23.

62. CLINE, *supra* note 18, at 26.

63. CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 368.

64. *Id.* at 344-45. On the institution of the chief, *see infra* notes 70-91 and accompanying text.

65. CHAPELLE, *PEUPLE TCHADIEN*, *supra* note 46, at 168; *see also* CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 344-45.



Map 3: Toubou Migration Patterns

JEAN CHAPELLE, NOMADES NOIRS DU SAHARA: LES TOUBOUS 213, 215 (1957) (reprinted with permission).

fragile.⁶⁶ "[T]he clan serves the individual," it has been observed, "but the individual does not serve the clan."⁶⁷ Without a higher authority to enforce obligations, the Toubous rely on honor and the threat of reprisal.⁶⁸

b. *Structures of Authority: The Chief*

Jean Chapelle, a former French officer who spent years among the Toubous in B.E.T., described the clan as an "acephalic social system."⁶⁹ Lloyd Cabot Briggs, an American anthropologist, elaborated on this idea:

Apparently the Teda [by which Briggs means Toubous] have long been politically in a state of kaleidoscopic fragmentation and recombination, because the various communal groups are often relatively isolated by the exigencies of their environment, because of a blood feud system which is elaborately formalized, and chiefly perhaps because the Teda have an extremely individualistic spirit so strong that it prevents their ever really uniting even in the face of an invasion.⁷⁰

Toubou society is simply too individualistic to permit the accumulation of political power in one man. Occasionally, a temporary chief will arise in the event of natural disaster or war, but his power lasts only as long as the conditions that necessitate it. The chief is not an authority figure who makes law, but rather an adviser or wise man who states custom.⁷¹ The Toubou term used to denote such an individual, *boui*, means "aged one."⁷² The chief possesses some authority to act for the clan in its relations with other clans and external groups, but he functions primarily as a conciliator or mediator. He has no authority to enforce any decision, to tax, or to punish members of his clan.⁷³ All Toubous being equal, each is free to obey or disregard the decisions of the chief.⁷⁴ Nor do the chiefs see themselves as serving some broader

66. CHAPELLE, *PEUPLE TCHADIEN*, *supra* note 46, at 167-68.

67. CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 350.

68. *Id.* at 345, 348.

69. *Id.* at 350.

70. BRIGGS, *supra* note 29, at 169-70.

71. Briggs described "[t]rue chieftainship . . . at the level of the tribe, which is a unit made up of clans and fractions held together by ties of kinship or by geo-political considerations." The tribal chief's functions include negotiating agreements with other tribes, leading warriors into battle, and mediating disputes (although the chief is without power to enforce his decisions). *Id.* at 170-71. While conglomerate or composite "clans" exist among the Toubous, other observers of Toubou society have not noticed this level of permanent organization among them, and in any event the powers that Briggs describes are largely ad hoc, concerned with external rather than internal affairs of the tribe, and limited to specific situations that demand a single spokesman.

72. CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 370; HAROLD D. NELSON ET AL., *AREA HANDBOOK FOR CHAD* 66 (1972).

73. CHAPELLE, *NOMADES NOIRS*, *supra* note 15 at 372. *But see* CLINE, *supra* note 18, at 43 (noting that *Derde* (chief of Tomagra clan) Chai Bogarmi levied tribute from cultivators, owners of date palms, passing caravans, and raiders).

74. CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 370; CLINE, *supra* note 18, at 43; *see also* BRIGGS, *supra* note 29, at 170 ("The principle of freedom raised almost to the level of anarchy is so deeply rooted in the Teda [Toubou] philosophy of life that many families refuse to acknowledge anyone as their chief, while individuals frequently dispute the authority even of their own family headman.").

public interest. Instead, each chief looks to, and seeks to reward, only a narrow clientele.⁷⁵

The chief does not occupy a hereditary position. By custom, an assembly of notables from another clan chooses each new chief from among the members of two or three prominent families.⁷⁶ Such is the case, for instance, with the *Derde* of Tibesti, the chief of the Teda clans.⁷⁷ The *Derde*, chosen by a council of notables of the Tozoba clan from among the three most important families in the Tomagra clan, is actually simply the chief of the Tomagra clan. Because the other Teda clans recognize the Tomagra as the noblest and purest clan, they accept the *Derde* as spiritual head as well.⁷⁸ Although the Gounda and Arna, two other noble Toubou clans, select their own chiefs, these chiefs recognize some duty to the *Derde*.⁷⁹

As is true of all Toubou chiefs, the authority of the *Derde* is more symbolic than actual. In addition to his position as spiritual leader of the Teda, the *Derde* represents the Teda in their relations with foreigners.⁸⁰ Traditionally, the *Derde* has had the greatest authority in Bardaï and Zumri (Zoumeri), in the northern part of Tibesti, and among the nomadic clans of the center of the massif. "Elsewhere he had prestige but little or no control."⁸¹ Although the *Derde*'s assent is sought on matters of public importance, individuals can act with impunity, often without the agreement of the *Derde* or even contrary to his wishes.⁸²

The power of any particular *Derde* will depend heavily upon his own personal influence. The *Derde* at the time of Nachtigal's visit in the late nineteenth century, Tafertemi, had "negligible influence."⁸³ In contrast, Chai Bogarmi, the *Derde* at the time of the French colonization of Chad, extended his power to the "maximum development" of the chieftainship. He collected tribute from cultivators, owners of date palms, and passing caravans, and he claimed a share of any booty from raids.⁸⁴ Chai built his power through a combination of good fortune and astute relations with outside powers. During a severe drought around 1890 the last of a series of old, weak, and ineffectual

75. CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 371.

76. *Id.* at 373.

77. CHAPELLE, *PEUPLE TCHADIEN*, *supra* note 46, at 169.

78. CLINE, *supra* note 18, at 43; *see also* BRIGGS, *supra* note 29, at 169; DECALO, *supra* note 13, at 110, 311.

79. CLINE, *supra* note 18, at 43.

80. CHARLES LE COEUR, *LE RITE ET L'OUTIL* 66 (1939) [hereinafter LE COEUR, *LE RITE*].

81. CLINE, *supra* note 18, at 43; *see also* LE COEUR, *LE RITE*, *supra* note 80, at 66 (stating that power of *Derde* is purely honorific).

82. *See* 1 NACHTIGAL, *supra* note 25, at 398-99; *see also* CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 353.

83. *Id.* at 398. Nachtigal added that where a Toubou chief did possess influence, "this was always based more on [his] personal qualities than on his official position, which by itself carried neither great influence nor any considerable income." *Id.* (footnote omitted).

84. CLINE, *supra* note 18, at 43; *see also* BRIGGS, *supra* note 29, at 169.

Derdes resigned. Chai, thirty years old, was named to succeed him. He immediately traveled to Bilma to consult a famous *marabout* (revered holy man and teacher), returned to Tibesti, and performed the sacrifices that had been recommended to him. That year it rained in Tibesti as never before.⁸⁵

This success brought Chai enormous prestige and respect, and he proceeded to strengthen his position. He made overtures to the Sanusiya, the Muslim religious brotherhood that had been spreading through the eastern Sahara.⁸⁶ Although Chai did not permit the Sanusi to infringe on his power, he did use the Sanusi influence to claim powers to enforce Muslim peace and Muslim law in Tibesti.⁸⁷ Chai tracked down, tried, and punished fugitive killers hiding in the mountains.⁸⁸ Under his leadership, Teda forces destroyed an invading force of Fazzanese in the early years of the twentieth century.⁸⁹ At the moment when his personal prestige was greatest, he cemented his position by submitting to the Turks. The Ottomans appointed Chai *kaymakam* (head of an administrative subunit of a *sancak*, or province) of Tibesti and granted him a monthly stipend.⁹⁰ However, even as strong a *Derde* as Chai was unable to compel behavior among the clans; when French forces arrived in Tibesti in 1914, Chai resisted while the Gounda clan submitted, and the Arna continued to resist after Chai later submitted.⁹¹

c. Fragmentation and Recombination of Clans

Because Toubou society is highly individualistic and lacks effective authority, the clans are not permanent institutions. They break up and recombine over time "in a never ending series of piecemeal disintegrations and local reconsolidations."⁹² In addition, the conditions of Toubou life erode clan structures. Men must take long voyages to find pasture, to harvest dates, and to trade. Because Toubou custom does not permit men to marry close relatives, marriage may require travel over a considerable distance. The members of any clan thus live dispersed over enormous areas, impeding centralization of authority. Furthermore, as a clan matures the increasing complexity of the web of obligations tends either to pull the clan apart or to render it unmanageable. Eventually, a clan will cease to have practical utility for its members and will

85. LE COEUR, *LE RITE*, *supra* note 80, at 66-67.

86. *See infra* note 239 and accompanying text.

87. When the Sanusi representatives in Tibesti tried to encroach upon Chai's traditional function of administering justice, Chai saw to it that they were recalled. *See infra* note 240 and accompanying text.

88. LE COEUR, *LE RITE*, *supra* note 80, at 67; *see also* WRIGHT, *CENTRAL SAHARA*, *supra* note 26, at 96-97.

89. *See infra* note 273 and accompanying text.

90. *See infra* notes 275-278 and accompanying text.

91. *See infra* note 348 and accompanying text.

92. BRIGGS, *supra* note 29, at 170.

dissolve, splinter, or disappear altogether. No current clan has existed for more than fourteen generations.⁹³

Some Toubous belong to political groupings in addition to, and separate from the clan system. These groups consist of sedentary Toubous, mostly Teda, who inhabit and take their name from a given locale—e.g., the Gouroa around Gouro, the Aouzouya around Aouzou. Such a group generally includes members of many different clans, but the common conditions of their habitat create a tie among them. These groupings are political not in the sense of obedience to law or authority, but rather in their relations with their neighbors.⁹⁴ They are essentially identical to clans in function and organization, differing only in their composition.

d. *Summary*

In summary, the Toubous are a highly individualistic people unwilling to recognize higher authority. Their society is splintered into numerous independent clans, and even the clans do not possess a political identity. The Toubous are opportunistic and strictly self-interested. Except in rare instances, they are unable to act in concert, and their self-interested behavior dooms any organized effort to ultimate fragmentation as individual Toubous desert the group to pursue better opportunities. These conditions render any claim to the exercise of sovereignty over the Toubous highly questionable.

4. *Geographic Distribution of the Toubou Clans*

A further obstacle to any historical claim to sovereignty over the whole of the Toubou people is the wide dispersal of the clans over the desert and the migrations of some clans, both within an annual cycle and over long periods of time. Each clan roams during the year within its own recognized area. Several clans also drive their animals far from these areas during parts of the year. The Tomagra, for instance, inhabit the southwestern part of the Tibesti massif, but they take their camels each year to Mortcha, in the south of Borku.⁹⁵ Although the pasture lands are "ownerless in theory," each clan has priority in the use of certain lands recognized as belonging to it by agreement with neighboring clans. Clans also "own" palm groves that are tended by the

93. CHAPELLE, NOMADES NOIRS, *supra* note 15, at 346-48.

94. *Id.* at 368; CHAPELLE, PEUPLE TCHADIEN, *supra* note 46, at 169. Briggs felt that these groupings possessed greater political cohesion than the clans, but no other observer has noticed any difference of this nature. See *supra* note 71.

The first Europeans in the area initially discovered the local groups and mistakenly applied European notions of political groups to them: "canton," "tribe." They encountered the clans only later and referred to them as "fractions." CHAPELLE, NOMADES NOIRS, *supra* note 15, at 369.

95. CHAPELLE, NOMADES NOIRS, *supra* note 15, at 126.

The Aouzou Strip

clan itself or by a servile or vassal clan;⁹⁶ each year, the clan visits its groves for the harvest.⁹⁷ This constant pattern of migration further hinders claims that a power asserted sovereignty over the Toubous. For instance, an occupying power may receive promises of submission from one clan in one spot during one time of the year, but that promise (assuming that it will even be honored) in no way binds other clans or even assures the occupying power of sovereignty over that spot.

The Toubous have also migrated over time, responding to the pressure of external events such as natural catastrophes or the rise of a powerful neighbor. Thus, for example, several clans have settled since the thirteenth century in the Tibesti massif, an impenetrable refuge from the "peoples of the plains," and several other clans, or parts of them, have left the area.⁹⁸ Since the tenth century the Teda have generally moved south from the Libyan desert into Tibesti, while the Daza have migrated south from Tibesti and Borku into Kanem and Biltine. The Bideyat have moved north into Ennedi from Ouadai, replaced by a related but separate people, the Zaghawa, who originally inhabited the area around Kawar in Niger.⁹⁹

Even as small an assemblage as the Teda of Tibesti, which can count fewer than ten thousand members,¹⁰⁰ includes groups of widely diverse origins. Only three or four Teda clans are native to the massif. Others have Daza origins, while yet others, such as the Aouzouya (or Emmeouia), come from the Donza clans immediately to the southeast of the massif. Still others have come from Bideyat clans in Ennedi, from Kufrah, or from the Tuareg tribes to the west.¹⁰¹ The Tomagra and the Gounda arrived from Bornu in the sixteenth century after having previously left the area.¹⁰² In the twentieth century the Gounda have migrated to Agadem, the Mourdia and the Gouroa toward Ennedi, and the Tomagra south toward Toro.¹⁰³

a. *The Teda Clans of Tibesti*

The Teda of Tibesti form approximately forty clans, none of which can count more than a few hundred members.¹⁰⁴ Each clan is associated with

96. As used here, the word "vassal" does not imply a formal recognition of allegiance; rather, the vassal relationship may stem from an ancient defeat of one clan by another, or from one clan's history of enslavement by another.

97. BRIGGS, *supra* note 29, at 178-79. For examples of Toubou migration patterns, see Map 3.

98. See CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 41-48.

99. *Id.* at 44-45.

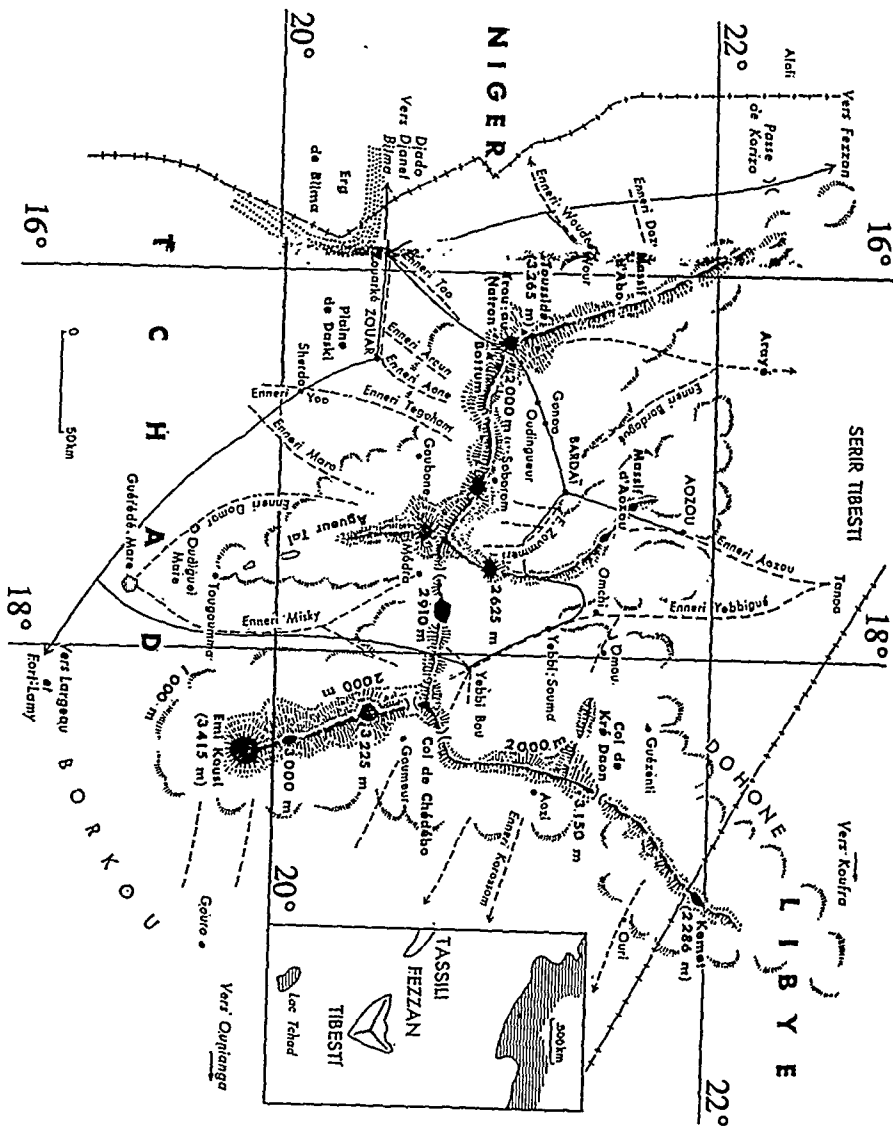
100. See *supra* note 29.

101. CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 72-79.

102. *Id.* at 59, 83, 376-77.

103. LEROUVREUR, *supra* note 19, at 396.

104. Réquin I, *supra* note 29, at 57; see also CLINE, *supra* note 18, at 13. See generally Map 4, Map 5.



Map 4: The Tibesti Massif

PIERRE BECK & GEN. PAUL HUARD, *TIBESTI: CARREFOUR DE LA PRÉHISTOIRE SAHARIENNE 14-15* (1969) (reprinted with permission).

particular areas. Although this loose association creates a temptation to locate individual clans on a map in order to shed some light on the Aouzou Strip dispute, any attempt to do so is a highly uncertain enterprise. First, the Teda move seasonally between oases and the plateaus of Tibesti, depending for their survival on their camels, goats, and whatever grains and nuts they can gather. The men travel in the winter to Kufrah, Fazzan, or Kavar, but not to other places in Chad, to trade their goods.¹⁰⁵ The transient character of the Teda, and the vast area their annual migration covers, would frustrate any attempt to associate specific clans with particular pieces of territory.

In addition, the classification into clans is somewhat arbitrary, since the clans are in the constant process of disintegration and reconsolidation described above.¹⁰⁶ The existence of composite clans made up of members of other clans illustrates the difficulties of classification. Furthermore, no particular area is exclusively associated with any one clan. The members of each clan are scattered over a wide area and mixed in with members of other clans; a typical village contains a few families from each of several clans, rather than many families from one or two clans. Finally, most of the information on clan history, origins, and migration is derived from native traditions. As such, it is largely undocumented and susceptible to modification or fabrication to fit local prejudices.¹⁰⁷

These disclaimers should put into perspective the following brief attempt to describe the distribution of the various Teda clans in the different parts of Tibesti. If any conclusion can be drawn from this effort, it must surely be that the distribution and movements of the Teda render futile and hopelessly complex any attempt to resolve the Aouzou Strip dispute by reference to the places occupied by the various groups inhabiting the area. Rather than comprehensively cataloguing the various tribes and their migrations, the following sections will focus on a few clans who have played significant historical roles or who highlight important aspects of Toubou culture.

(1) *Clans of Northern and Eastern Tibesti*

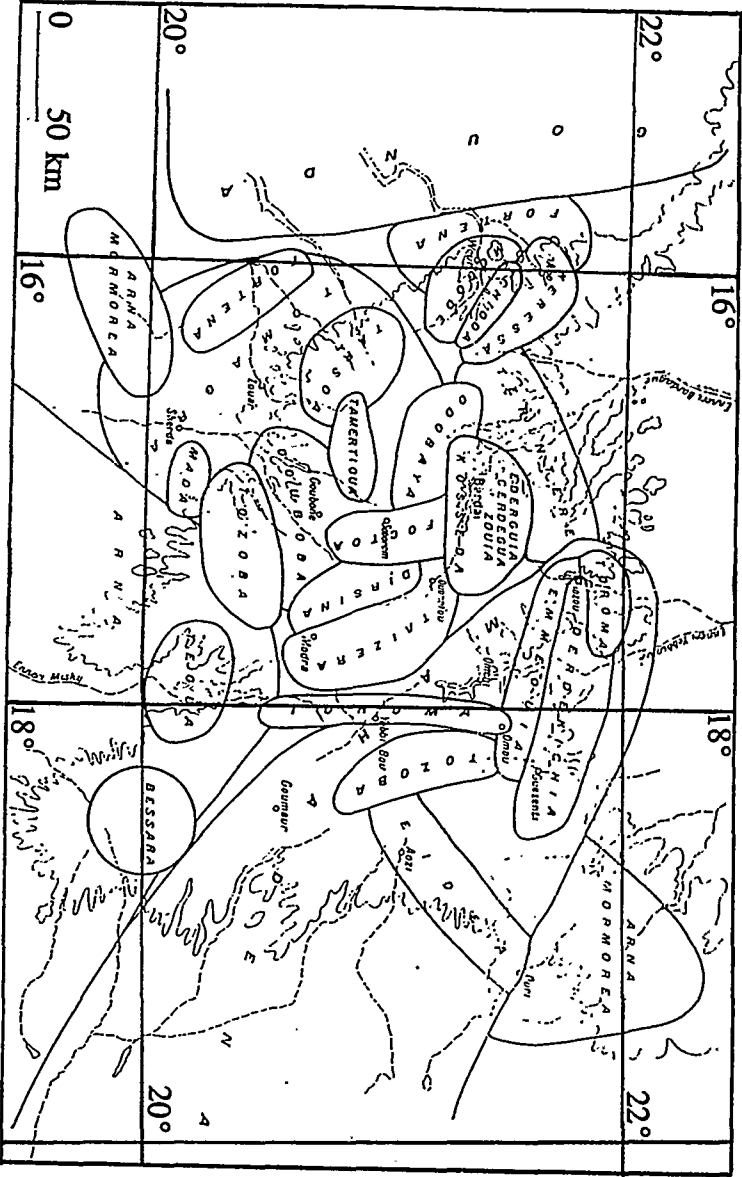
The Aouzou Strip runs through the northern and eastern parts of Tibesti, an area that includes the best land and the largest part of the population of the massif. Eastern Tibesti has two belts of habitation: the first spans the foot of the massif between Ouri and Gouro; the second, slightly to the west, comprises several villages in the mountains, including Aozî, Goumeur, and Tioro.¹⁰⁸ In the northeast, the valleys (*enneris*) of the Aouzou massif and Enneri Yebbi

105. LEROUVREUR, *supra* note 19, at 397, 399-400.

106. Réquin I, *supra* note 29, at 57.

107. CLINE, *supra* note 18, at 18.

108. *Id.* at 13, 25.



Map 5: Geographic Distribution of the Teda Clans of Tibesti
 JEAN CHAPELLE, NOMADES NOIRS DU SAHARA: LES TOUBOUS 94-95 (1957) (reprinted with permission).

The Aouzou Strip

and its tributaries are the principal population centers.¹⁰⁹ The northern part of Tibesti, especially the areas around Bardaï, Zumri, Aouzou, and Guezenti, contains not only the most productive gardens and date palms but also excellent grazing land.¹¹⁰

In the area around Aouzou live the Tedema, the Emmeouia, and the Derdekichia (a combination of Arna and Emmeouia).¹¹¹ The Tozoba live slightly to the east, in Guezenti, Omou, and Enneri Yebbi.¹¹² South of the Aouzou massif live the Mahadena.¹¹³ Several small clans rove the eastern slopes of Tibesti: the Teghaa, Bessara, Eidea, and Torama.¹¹⁴ These clans range over territory on both sides of the line claimed by Libya.

West of Aouzou, several clans occupy the Bardaigue-Araye-Zumri region. These clans include the Terintera (who have maintained contacts at Kufrah),¹¹⁵ the Odobaya,¹¹⁶ the Ederguia,¹¹⁷ the Kussada,¹¹⁸ and the Taizerea, who migrated to Tibesti around 1815 after being driven from Kufrah by the Zowaya Arabs.¹¹⁹ In the area around Ouri, east of Aouzou, the Ouria (a composite clan whose members originally belonged to other Teda clans) occupy the oases of Yebbi Bou, Goumeur, and Aozî¹²⁰ and the surrounding areas in eastern Tibesti. The Ouria, too, straddle the line claimed by Libya. Members of the Arna and their vassals, the Marmarea, also inhabit this area.¹²¹ They are the only Teda clan of Tibesti inhabiting territory on both sides of the boundary claimed by Chad, although some other clans regularly cross that boundary in the course of their migrations and some have relatives in Libyan oases.

The Gouroa, another composite group composed of members of other Teda clans (Mahadena, Arna, Eidea, Odobaya, and Gourma), live in the region of Gouro, an oasis on the southeastern edges of the massif.¹²² The Gouroa wan-

109. *Id.* at 13, 23.

110. *Id.* at 23, 24, 25, 32.

111. Most of the Emmeouia have left Tibesti for Borku, and the Tedema, who stayed in the Aouzou region, are dying out. Lt. Réquin, *Les clans Tedda du Tibesti* (pt. 2), 45 B.C.A.F. 259, 260 (1935) [hereinafter Réquin II]; see also CLINE, *supra* note 18, at 14.

112. Réquin I, *supra* note 29, at 59; see also CLINE, *supra* note 18, at 15.

113. CLINE, *supra* note 18, at 15-16.

114. Réquin II, *supra* note 111, at 260; see also CLINE, *supra* note 18, at 16.

115. Réquin II, *supra* note 111, at 259; see also CLINE, *supra* note 18, at 15.

116. Réquin II, *supra* note 111, at 260; see also CLINE, *supra* note 18, at 14.

117. CLINE, *supra* note 18, at 14.

118. *Id.* at 16.

119. The Taizerea are also found in eastern Tibesti, and a few live as far away as 'Uwaynat in the southern part of the Libyan Desert. *Id.* at 15.

120. The Ouria comprise members of several other Teda clans found in eastern Tibesti: Mahadena, Torama, Odobaya, Foktoa, Teghaa, and Eidea. See CHAPELLE, NOMADES NOIRS, *supra* note 15, at 119.

121. See *supra* notes 125 & 128 and accompanying text.

122. CHAPELLE, NOMADES NOIRS, *supra* note 15, at 119; LEROUVREUR, *supra* note 19, at 421, 424. LeRouvreur identifies the Gourma, the fifth element of the Gouroa, as a Daza clan. *Id.* at 424.

der over an enormous area stretching from southwest Tibesti to the eastern edge of Ennedi.¹²³

(2) *Clans of Western, Southern, and Central Tibesti*

Southern Tibesti contains several valleys—Enneri Miski, Enneri Maro, and Enneri Tehagam—that support a semi-nomadic population.¹²⁴ The Arna, considered a noble clan, occupy a region that stretches along the mouths of the *enneris* over the southern edge from Maro to Gouro and wraps around on the eastern edge of Tibesti as far north as Ouri.¹²⁵ They range from there over a large area extending south from the massif.¹²⁶ Their trading routes keep them wholly within Tibesti, Borku, and Kanem.¹²⁷ Their vassals by tradition, the Marmarea, inhabit Enneri Marmar in the southwest corner of Tibesti and are also found with the Arna along the north edge of the massif around Ouri.¹²⁸

The Tomagra clan occupies the southwest corner of the massif, between Zouar and Sherda. The Tomagra arrived in Tibesti in the sixteenth century, defeated the Derdekichia clan (the clan from which the *Derde* had hitherto been chosen), and extended their influence over all of Tibesti. A rivalry with the Gounda followed and ended with the defeat and migration of the Gounda to Abo, Kavar, and Fazzan.¹²⁹ The Tomagra drive their camels each year to Djourab and Mortcha, in the south of Borku, for pasture.¹³⁰

Western Tibesti, including the massif of Abo, is in general poorly suited for human habitation. Agricultural conditions are unfavorable except in the valleys of Marmar, Zouar, and Yoo, where there are good pastures.¹³¹ The Abo area in the northwest part of Tibesti contains excellent grazing lands and some date palms.¹³² Clans inhabiting western Tibesti include the Gounda, considered one of the most noble of the Teda, and found in Kavar in Bornu

123. FERRANDI, *supra* note 18, at 177. Sedentary when the French arrived, the Gouroa have gradually become nomadic. LEROUVREUR, *supra* note 19, at 421-22.

124. CLINE, *supra* note 18, at 13, 24.

125. *Id.* at 15; see also Réquin II, *supra* note 111, at 260.

126. LEROUVREUR, *supra* note 19, at 432.

127. *Id.* at 432-34.

128. CHAPELLE, NOMADES NOIRS, *supra* note 15, at 80; Réquin II, *supra* note 111, at 260.

129. CLINE, *supra* note 18, at 14; Réquin I, *supra* note 29, at 58-59.

130. CHAPELLE, NOMADES NOIRS, *supra* note 15, at 125, 126.

131. *Id.* at 23, 32.

132. *Id.* at 23, 25, 32.

The Aouzou Strip

and Marzuq in Fazzan as well,¹³³ the Mogodi;¹³⁴ the Keressa;¹³⁵ and two smaller clans, the Tchioda and the Abordami.¹³⁶

In Bornu, to the west, live the Braoya (or Djadoboi, after the group of oases they inhabit). In addition, numerous other Teda clans from Tibesti, as well as the Anakazza (a Daza clan from Borku and Ennedi) also have members in Bornu.¹³⁷

Central Tibesti is home to numerous small clans: the Dirsina,¹³⁸ the Goboda,¹³⁹ the Tomourtoua, the Tarsoa,¹⁴⁰ the Foktoa (who formed from other clans after the Taizerea invaded in the early nineteenth century),¹⁴¹ and a few Belalia, a clan found predominantly in Bilma.¹⁴²

b. *The Clans of Borku and Ennedi*

The clans of Borku and Ennedi highlight several features of Toubou culture. While each region is home to numerous clans, only a few need to be discussed to convey a sense of those features.¹⁴³

The Kamadja are not actually a clan, but rather a semi-servile caste spread throughout the Toubou lands. Employed by the Teda for labor deemed menial, the Kamadja are mostly descendants of former captives.¹⁴⁴

The Kokorda are noteworthy as a composite of eight clans of geographically diverse origins.¹⁴⁵ Furthermore, their patterns of annual migration are representative of Toubou behavior. The Kokorda previously shared the oases of Borku with the Anakazza; the Kokorda occupied the oases to the west, and the Anakazza occupied those to the east. In the middle of the twentieth century the Kokorda migrated eastward to Toro from the grazing lands they previously used southeast of Faya. The Kokorda presently retain interests in certain oases,

133. CLINE, *supra* note 18, at 14-15; 1 NACHTIGAL, *supra* note 25, at 419; Réquin I, *supra* note 29, at 57.

134. CLINE, *supra* note 18, at 14; Réquin I, *supra* note 29, at 57.

135. CLINE, *supra* note 18, at 15.

136. Réquin I, *supra* note 29, at 57.

137. CHAPELLE, NOMADES NOIRS, *supra* note 15, at 103.

138. CLINE, *supra* note 18, at 14.

139. *Id.* at 15; 1 NACHTIGAL, *supra* note 25, at 419.

140. CLINE, *supra* note 18, at 16; Réquin II, *supra* note 111, at 260.

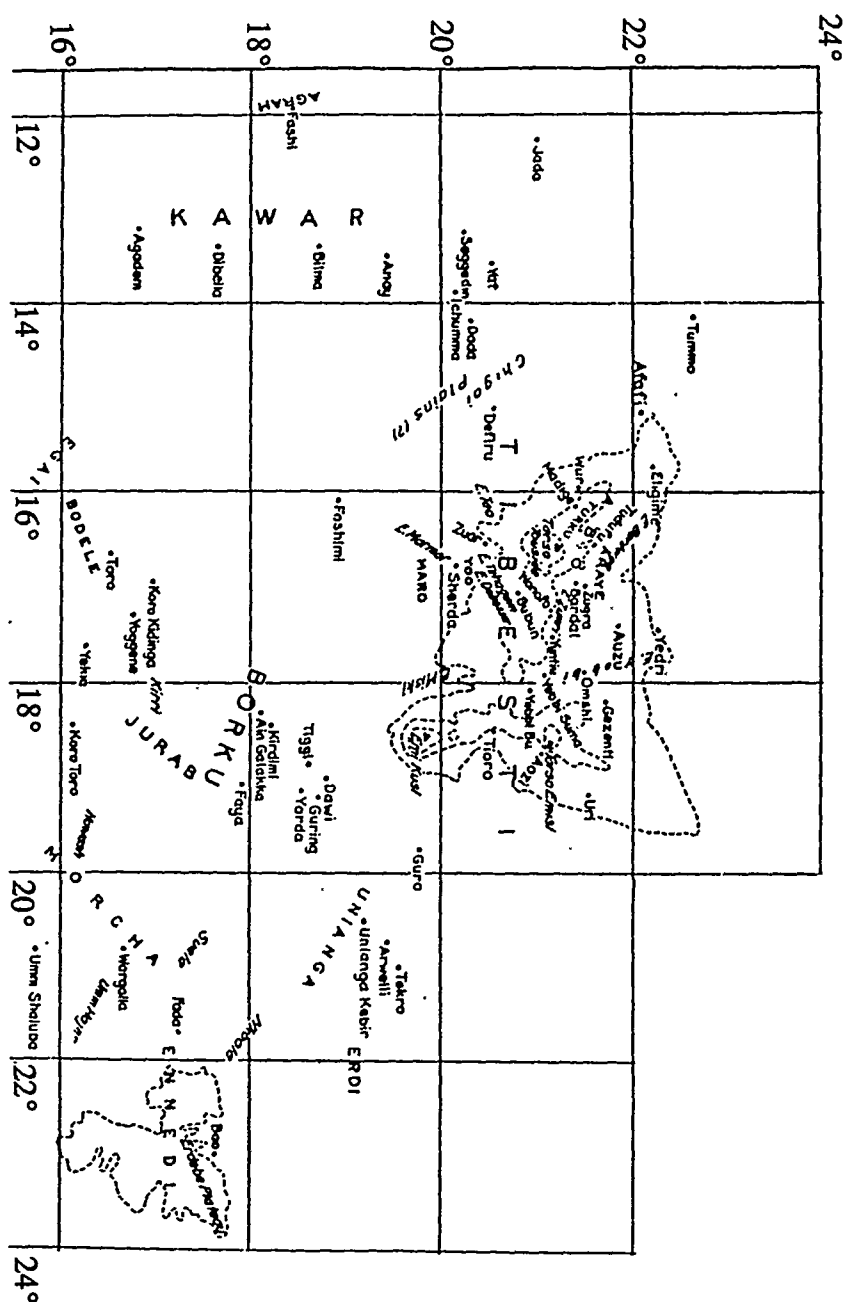
141. CLINE, *supra* note 18, at 16.

142. *Id.* at 15.

143. For a map locating the Toubou clans of Borku and Ennedi in addition to Tibesti, see Map 7.

144. See CHAPELLE, NOMADES NOIRS, *supra* note 15, at 7; Réquin II, *supra* note 111, at 164. Although LeRouvreur concurs as to the role and origins of the Kamadja, he reports that their former masters were Anakazza, not Teda, and that their area of inhabitation is much smaller, confined to the string of oases stretching from Ain Galakka to Faya-Largeau. LEROUVREUR, *supra* note 19, at 387-90. The Ounia are another servile caste who cultivate the oases of the Gaeda southeast of Gouro, but they have also become semi-nomadic in the past fifty years, adopting camel-raising and spending part of each year in Mourdi. *Id.* at 415-16.

145. LEROUVREUR, *supra* note 19, at 412-13.



WALTER CLINE, THE TEDA OF TIBESTI, BORKU AND KAWAR IN THE EASTERN SAHARA 6 (Gen. Ser. Anthro. No. 12; 1950) (reprinted with permission).

returning from June through September for the date harvest.¹⁴⁶

The Anakazza, a collection of approximately fifteen to twenty large families of diverse origins with some seven thousand members, form the most populous single group in Borku.¹⁴⁷ Their name indicates a mixture of Bideyat and other Toubou groups from Borku.¹⁴⁸ They present a good example of the extent of Toubou migration. After 1925, as the French administration brought raiding by other Toubous, 'Awlad Sulaiman Arabs, and Tuaregs under control, the Anakazza migrated west from the northern part of Mortcha to Djourab. There they raise camels, but almost the entire group travels to the oases around Faya for the date harvest from July to October, while the young men remain behind to tend the camels. Between October and April the men travel south to Ouadai to trade at the markets there. In April each family is reunited in Djourab, where they stay until July.¹⁴⁹ The Anakazza "own" extensive holdings, which once included parts of Djourab where they pastured their animals part of the year, and they roam east to Oum Chalouba in Ennedi and beyond.¹⁵⁰

The Anakazza also illustrate the kind of historical Toubou behavior that complicates claims to the region. At the time the French arrived the Sanusi religious brotherhood controlled the northern oases that supplied the Anakazza with dates, while the French controlled their customary pastures further south. Forced to choose between them, the Anakazza split: some sided with the Sanusi, and others with the French.¹⁵¹ Thus, either Libya or Chad could now cite the Anakazza in support of its claims, when in reality the Anakazza merely acted out of typical Toubou self-interest, without hierarchical control.

In Ennedi, the Mourdia rove in the Mourdi Depression and along the northern parts of the Ennedi highland.¹⁵² Another collection of approximately twenty clans of various origins, the Mourdia are the only group besides the Teda of Tibesti to inhabit part of the Aouzou Strip. They occupy the northeast corner of Ennedi and spill over into Sudan to the east. Their migration takes them between the massif of Ennedi in the warm months and the open spaces

146. *Id.* at 414.

147. LEROUVREUR, *supra* note 19, at 405; see also CHAPELLE, NOMADES NOIRS, *supra* note 15, at 130, 132 (reporting 19 clans actually split into 30 fractions); FERRANDI, *supra* note 18, at 111.

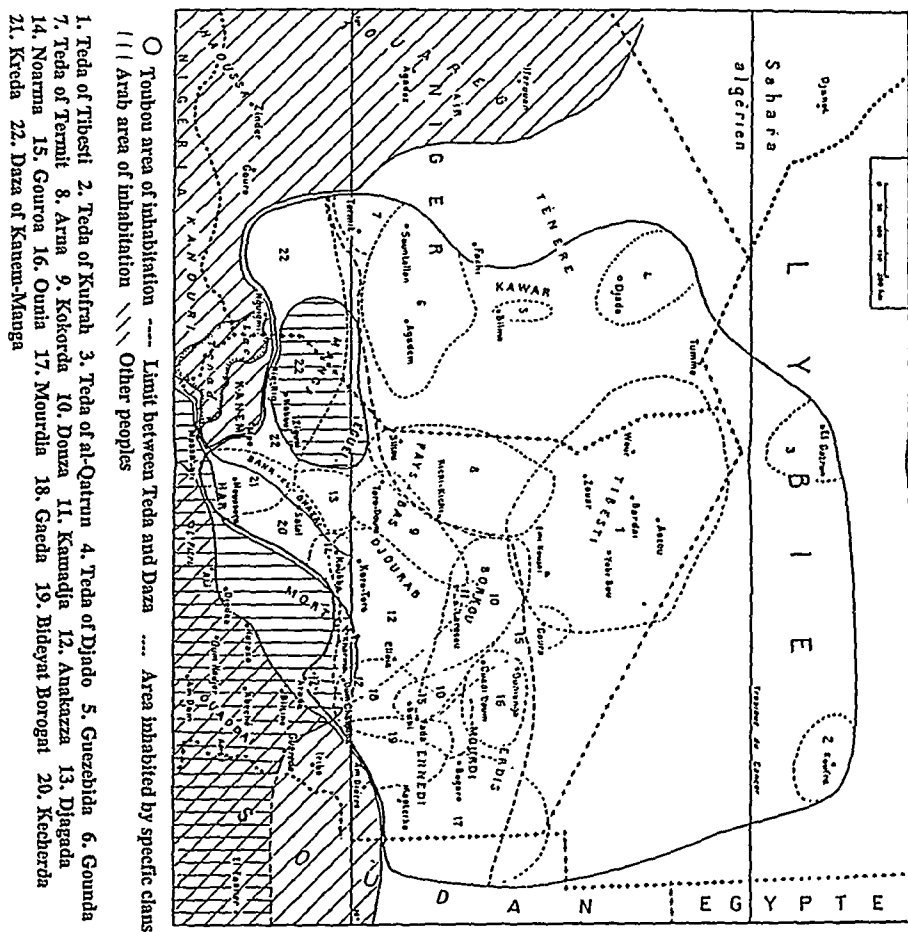
148. "Ana" is the Toubou word for the Bideyat; "kazza" signifies "mixed." CHAPELLE, NOMADES NOIRS, *supra* note 15, at 131 n.67.

149. LEROUVREUR, *supra* note 19, at 405-08. Another Toubou clan with a large area of migration is the Gaeda, who rove for part of each year along the western edges of Ennedi, descend in late summer to Mortcha, and return in July to traditional oases southeast of Gouro for the date harvest. CHAPELLE, NOMADES NOIRS, *supra* note 15, at 124.

150. FERRANDI, *supra* note 18, at 104, 111. In the early twentieth century Arab tribes drove the Anakazza from Djourab. CHAPELLE, NOMADES NOIRS, *supra* note 15, at 132.

151. See *infra* notes 334-338 and accompanying text. The Gaeda behaved similarly, with one faction holding out for a short time and another submitting immediately to the French forces. LEROUVREUR, *supra* note 19, at 420.

152. CHAPELLE, NOMADES NOIRS, *supra* note 15, at 135.

**Map 7: Location of Toubou Clans**

ALBERT LEROUVREUR, SAHÉLIENS ET SAHARIENS DU TCHAD 56-57 (1962) (reprinted with permission).

north and east of it in the colder months. They are also noteworthy because their origins illustrate the process of clan formation. The Mourdia are descended from an Arna who left the eastern slopes of Tibesti and settled in the Mourdia Depression in the late eighteenth century.¹⁵³

Southeast of the Mourdia are the Bideyat, and south of them live the Zaghawa. Although similar physically and in social organization to the Toubous, these groups have different customs and languages.¹⁵⁴ The semi-nomadic Bideyat are actually of Zaghawa, not Toubou, origin. Reportedly native to Ennedi (and formerly Ouadai), the Bideyat clans form two major groups. The Bideyat Borogat, a relatively old confederation whose twenty clans have a total of some five thousand members, inhabit western Ennedi. The slightly more numerous Bideyat Bilia inhabit the east and the areas south of the plateaus.¹⁵⁵ The Bideyat, like the Anakazza, split between the French and the Sanusi.¹⁵⁶ They also exploited the hostility between them, always serving their own interests by telling each side what it wanted to hear.¹⁵⁷

One final group, the 'Awlad Sulaiman, may be mentioned here, although they are of Libyan Arab origins and not Toubous at all. As a result of emigrations in the nineteenth and twentieth centuries, the 'Awlad Sulaiman emigrated from Libya and settled in northern Chad. Although Libya has argued that the presence of this tribe supports a Libyan claim to the Aouzou Strip, the 'Awlad Sulaiman do not inhabit any of the contested territory or any area near it. They live only in the southernmost parts of the Toubou lands, occupying parts of Kanem, far to the south of the Aouzou Strip.¹⁵⁸

5. Some Conclusions About the Toubous

Some of the Toubou clans have migrated since 1935, but the general location of most clans has not changed significantly.¹⁵⁹ The areas that had, through submission of a clan, passed under the control of the Sanusi or the French are in general still home to the same clans that occupied them at that

153. LEROUVREUR, *supra* note 19, at 426-28. Other, smaller clans in this region include the Erdia and the Tabia. *Id.* at 424-26.

154. CHAPELLE, NOMADES NOIRS, *supra* note 15, at 136; CHAPELLE, PEUPLE TCHADIEN, *supra* note 46, at 45, 170; LEROUVREUR, *supra* note 19, at 403.

155. CHAPELLE, NOMADES NOIRS, *supra* note 15, at 137; FERRANDI, *supra* note 18, at 208; LEROUVREUR, *supra* note 19, at 428-32.

156. FERRANDI, *supra* note 18, at 217, 231.

157. *Id.* at 216.

158. See LEROUVREUR, *supra* note 19, at 63, 436-41.

159. Compare CHAPELLE, NOMADES NOIRS, *supra* note 15, at 67-138 (noting location of clans in 1957) with Réquin I, *supra* note 29, at 55-59 (noting location of clans in 1935) and Réquin II, *supra* note 111, 259-64 (same).

time.¹⁶⁰ Consequently, relations between particular powers and Toubou groups might support a claim to sovereignty over the regions inhabited by those groups.

However, the foregoing description of the Toubous makes clear that serious obstacles confront a claim to sovereignty over part of their land based on relations with some of its inhabitants. First, the distribution of the clans themselves dooms to futility any attempt to draw a line based on population. Parts of the same clan may be found at different locations, and one area may often be home to members of several different clans. Therefore, relations with one clan will not necessarily confer exclusive sovereignty over that clan's traditional territory.

Second, the acute fragmentation of Toubou society and the completely opportunistic behavior of the Toubous renders doubtful any claim that political relations with a particular clan or chief is sufficient to entail a relation of sovereignty. The *Derde*, as we have seen, was and is unable to command any obedience from other clans or individuals in political matters. Other chiefs wield even less authority. There is simply no guarantee that individual Toubous will follow their chiefs. In short, the anarchy of Toubou society precludes any claim based on the subordination of individuals to the chief.

III. HISTORY OF THE AREA

The parties to any boundary dispute cannot put forth legal arguments without reference to the underlying history of the disputed territory. This is especially true for the Aouzou Strip controversy. Each party must try to establish that at some crucial point in the past, the Aouzou Strip belonged to it or its predecessor through a display of sovereignty in the region. The history of the area is extraordinarily complex. But without an understanding of that history no observer can appreciate the origins of the dispute or formulate an informed opinion as to its proper resolution.

A. From the Tenth to the Nineteenth Century: The Influence of Kanem, Bornu, and Tripoli

In August 1890, France and Great Britain signed a declaration recognizing a French zone of influence in the Algerian hinterland as far as the shores of Lake Chad. At the end of October, the Ottoman Empire protested in diplomatic notes, claiming that the agreement violated established Turkish rights in the Tripolitanian hinterland. According to the Turks, this hinterland included

160. However, migration has nonetheless occurred: lack of rainfall in the 1970s caused the Gounda clan of Tibesti to move south and west, and the Ouria have also abandoned Ouri due to drought there. CHAPPELLE, *NOMADES NOIRS*, *supra* note 15, at 119, 416.

Tibesti, Borku, Ennedi, and Kanem (north and east of Lake Chad), and extended as far as the watershed between the Congo and Lake Chad.¹⁶¹ Although this protest marks the beginning of the dispute over the Aouzou Strip, understanding the controversy requires a review of events even further in the past.

1. *The Dominance of the South: Kanem, Bornu, and Ouadai*

The early history of northern Chad was shaped by its more populous and wealthy southern neighbors, the powerful kingdoms of Kanem and Bornu. One Toubou family from Fazzan, the Sefawa, played an important role in the founding of the Empire of Kanem in the eighth and ninth centuries.¹⁶² At the height of its power in the thirteenth century, Kanem's control extended, in the words of the contemporary chronicler Ibn Sa'id, "over the countries of the desert up to Fazzan."¹⁶³ One of the kings of Kanem, Dounama Dibalemi, fought a seven-year war against the Toubous before establishing a colony in Fazzan, reportedly installing a Toubou lieutenant to govern it.¹⁶⁴ Shortly afterward, however, this officer rejected Kanem's authority, took the title of *Mai* (king), and founded a dynasty lasting into the fourteenth century.¹⁶⁵

Starting in the second half of the fourteenth century, however, a series of invasions weakened Kanem, and the focus of power shifted westward into Bornu. In the fifteenth century, Bornu was struggling against invaders in Kanem and no longer had a presence in Borku, Ennedi, or Tibesti.¹⁶⁶ But a late sixteenth-century *mai* of Bornu, Idris Alaoma, made war on some Toubous in northeast Kanem, causing the Tomagra and Gounda clans to

161. See Note to the Minister of Foreign Affairs (Feb. 1899), in 15 DOCUMENTS DIPLOMATIQUES FRANÇAIS (1871-1914) [D.D.F.] (ser. 1) No. 98, at 155-56 (1959); LANE, *supra* note 11, at 27; ETTORRE ROSSI, STORIA DI TRIPOLI E DELLA TRIPOLITANIA 341 (1968) [hereinafter ROSSI, STORIA]; Ettore Rossi, *Per la storia della penetrazione turca nell'interno della Libia e per la questione dei suoi confini*, 9 ORIENTE MODERNO 153, 161-62 (1929) [hereinafter Rossi, *Penetrazione*]; *Les aspirations italiennes en Afrique*, 39 B.C.A.F. 325, 326 (1929) [hereinafter *Les aspirations*]. During the negotiations preceding the convention, France and Great Britain anticipated that the Sultan might protest the agreement as an infringement of his rights. See Telegram from William Waddington, French Ambassador to Great Britain, to Minister of Foreign Affairs Ribot (Aug. 6, 1890), in 8 D.D.F. (ser. 1) No. 141, at 198-200 (1938). Accordingly, they inserted a clause stipulating that the arrangement "does not affect the rights that the Sultan may have over the regions situated on the southern boundaries of his Tripolitanian provinces." *Id.* at 198. Lord Salisbury, the British Prime Minister, gave a speech to the same effect to the House of Lords on August 10, 1890. JEAN PICHON, LA QUESTION DE LIBYE DANS LE RÈGLEMENT DE LA PAIX 48 (1945).

162. LANE, *supra* note 11, at 27; see also CLINE, *supra* note 18, at 19; MONIQUE COMBY, DOCUMENTATION SUR LES EMPIRES TCHADIENS 0 (1984).

163. See CHAPPELLE, PEUPLE TCHADIEN, *supra* note 46, at 58; see also COMBY, *supra* note 162, at 0; NELSON ET AL., *supra* note 72, at 26. Ibn Khaldun, writing in the fourteenth century, gave a similar description of the extent of Kanem's domination. CHAPPELLE, NOMADES NOIRS, *supra* note 15, at 8-9.

164. CHAPPELLE, PEUPLE TCHADIEN, *supra* note 46, at 198; cf. CLINE, *supra* note 18, at 19.

165. CHAPPELLE, NOMADES NOIRS, *supra* note 15, at 49-50.

166. CHAPPELLE, PEUPLE TCHADIEN, *supra* note 46, at 199-200; NELSON ET AL., *supra* note 72, at 27.

migrate to Tibesti.¹⁶⁷ He also received a large ambassadorial party from the Ottoman Sultan.¹⁶⁸ Following the death of Idris Alaoma, Bornu lost political power but retained its economic vitality.¹⁶⁹ Tripoli conducted "lively" commercial relations with Bornu, and during the mid-seventeenth century it twice exchanged ambassadors with the sovereign of Bornu, *Mai Omar*.¹⁷⁰ Despite the commercial importance of Bornu, the dynasty itself was weak, and the Peul invasions from the west in the early nineteenth century essentially finished it off. The Sefawa had to appeal for aid to Muhammad al-'Amin, a powerful tribal notable from Kanem. In 1846, Muhammad al-'Amin's son Umar overthrew the last of the Sefawa, who had been reduced to figureheads.¹⁷¹

Beginning in the eighteenth century, the empire of Ouadai, a trading sultanate, began to gather power to the east as Bornu's influence faltered. By 1780 Ouadai was able to take Kanem and Baguirmi from Bornu.¹⁷² At the apogee of Ouadai's power in the early nineteenth century, Sultan Sabun opened up a commercial route to Banghazi through Oum Chalouba, Ennedi, and Kufrah, further weakening Bornu by speeding the decline of the trade routes linking it to Fazzan.¹⁷³ A successor to Sabun, Muhammad Sharif, defeated Bornu and gained hegemony over a large part of Chad.¹⁷⁴ Ottoman authority was not a factor in this area at the time; it remained confined to the coastal portions of Tripolitania and Cyrenaica.¹⁷⁵

167. See *id.* at 201-02; CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 59; see also COMBY, *supra* note 162, at 2. Idris Alaoma, although a Muslim, did not recognize the Ottoman Sultan's authority as superior to his own. In 1577, after Turkish soldiers briefly conquered Fazzan and seized a fortress along a trade route, Idris sent an embassy to Constantinople to protest Turkey's meddling in Bornu's trade and to seek Turkish aid in a war against one of the Hausa states. However, the Sultan returned a high-handed response, and no alliance ensued. *Mai* Idris eventually sought aid from Morocco, which at the time ruled Fazzan. WRIGHT, *CENTRAL SAHARA*, *supra* note 26, at 44-45. Wright believes that such incidents "might well have given the Ottomans an inflated impression of the allegiance and sovereignty they nominally exercised in central Africa, and were indeed to claim in the face of European expansion into Africa at the end of the nineteenth century." *Id.* at 45.

168. NELSON ET AL., *supra* note 72, at 28.

169. COMBY, *supra* note 162, at 3-4.

170. NELSON ET AL., *supra* note 72, at 30; Rossi, *Penetrazione*, *supra* note 161, at 154.

171. COMBY, *supra* note 162, at 5-8, 10-11; NELSON ET AL., *supra* note 72, at 28.

172. COMBY, *supra* note 162, at 5, 7-9.

173. CHAPELLE, *PEUPLE TCHADIEN*, *supra* note 46, at 204-05; COMBY, *supra* note 162, at 7, 17; see also KOLA FOLAYAN, *TRIPOLI DURING THE REIGN OF YUSUF PASHA QARAMANLI* 80 (1979); MAGALI MORSY, *NORTH AFRICA, 1800-1900: A SURVEY FROM THE NILE VALLEY TO THE ATLANTIC* 60 (1984).

174. CHAPELLE, *PEUPLE TCHADIEN*, *supra* note 46, at 205-06; see also CHRISTIAN BOUQUET, *TCHAD: GENÈSE D'UN CONFLIT* 43 (1982).

175. WRIGHT, *CENTRAL SAHARA*, *supra* note 26, at 44-46. Wright states that "the tribes' acknowledgment of the Sultan at Constantinople as *caliph* did not imply any willingness to obey his laws, serve in his armed forces, and least of all to pay his taxes." *Id.* at 46. A settlement was reached in 1626 in which Turkey recognized the authority of the local 'Awlad Muhammad (Moroccan) ruler, and Fazzan agreed to pay an annual tribute to Constantinople. Bornu maintained trade relations with Tripoli as well. *Id.*

2. *The Karamanli Dynasty in Tripoli and Expeditions to the South, 1711-1835*

In 1711, a Turkish cavalry officer named Ahmed Karamanli overthrew the last of a series of weak *deys* (the title, after 1611, of the head of the Turkish government in Tripoli)¹⁷⁶ and effectively bought the Ottoman Sultan's recognition of his status as an independent *paşa* (or *pasha*, denoting governor or military commander). Karamanli invaded Fazzan twice in response to its failure to meet its tribute obligations, reasserted Tripoli's rights to commercial access to the Sudanic regions south of the desert, and imposed a "modest" tribute on Fazzan. His aim, however, seems to have been largely to strengthen Tripoli's share of the trans-Saharan trade,¹⁷⁷ of which the principal element was the slave trade.¹⁷⁸

At approximately the same time the regions to the north began to exercise greater influence over the Toubous and the Aouzou Strip area. From about 1815 onward the growth of the power of the European trading states in the Mediterranean forced the Karamanlis to turn to the south. The Karamanlis' power then reached no further south than Ghadamis,¹⁷⁹ but military raids began against Kanem in 1818.¹⁸⁰

The Toubous, who had long occupied Kufrah and Fazzan, began migrating south as a result of invasions from the north. Beginning in the eighteenth century, the Zawiyah (or Zowaya) Arabs from the Tripolitanian coast had driven the Toubous from all but the southernmost oases of Fazzan.¹⁸¹ In 1813, Yusuf Paşa Karamanli, the governor of Tripoli, sent an expedition under Muhammad al-Mukni to subject Fazzan to Ottoman rule and govern it. Al-Mukni succeeded in establishing Ottoman rule and even conducted slave raids into Kanem. However, Karamanli power soon waned, and in 1831 the 'Awlad

176. The term *dey*, literally "maternal uncle," originally referred to a junior officer commanding a company of janissaries, the elite Ottoman military corps. In 1611 the *deys* of Tripolitania staged a successful coup and secured the appointment of their leader as head of the government. His successors kept the title of *dey*. See La Verle Berry, *Historical Setting*, in *LIBYA: A COUNTRY STUDY* 18-19 (Helen Chapin Metz ed., 1989).

177. WRIGHT, *CENTRAL SAHARA*, *supra* note 26, at 47.

178. *Id.* at 48.

179. *Id.* at 62.

180. MORSY, *supra* note 173, at 101; see also WRIGHT, *CENTRAL SAHARA*, *supra* note 26, at 61.

181. CHAPPELLE, *NOMADES NOIRS*, *supra* note 15, at 48-50; ROSITA FORBES, *THE SECRET OF THE SAHARA: KUFARA* 211 (1921); ANNIE M.-D. LEBEUF, *LES POPULATIONS DU TCHAD* 11 (1959); WRIGHT, *CENTRAL SAHARA*, *supra* note 26, at 86.

Until the Arab invasions the oasis of Kufrah was called Taiser; it received the name "Kufrah," which means "pagan" in Arabic, after the Muslim victory over the Toubous who had previously held it. 1 NACHTIGAL, *supra* note 25, at 366 n.2; see also GAUTIER, *supra* note 15, at 132. Most of the Toubou families migrated in 1813 to Tibesti, where they formed the Taizerea clan. CLINE, *supra* note 18, at 20; see also *supra* notes 119 & 141 and accompanying text. However, a few Toubous remained in Kufrah, generally in a wretched condition. See CLINE, *supra* note 18, at 20; FORBES, *supra*, at 211; GAUTIER, *supra* note 15, at 132-33.

Sulaiman Arabs under 'Abd-al-Jalil seized Fazzan and ruled it as their own until the 1840s.¹⁸² From there, the 'Awlad Sulaiman began raiding in Bornu, Kanem, and Borku and cut Karamanli control over their trade routes.¹⁸³

Other efforts by the Karamanlis were unsuccessful at establishing their sovereignty over the regions south of the Tripolitanian coast. Yusuf Paşa Karamanli sent an expedition to Bornu in 1807-1808 to establish commercial relations, but the mission enjoyed only limited success.¹⁸⁴ In 1817, Muhammad al-'Amin, the de facto ruler of Bornu, proposed to Tripoli a joint action against southern rebels.¹⁸⁵ Yusuf Paşa, encouraged by this overture, sent an expedition across Fazzan in conjunction with the English explorers Denham and Clapperton. Hoping to prepare the way for a future invasion of the area, Yusuf found instead that Muhammad al-'Amin's troops would outmatch his own.¹⁸⁶ Financial difficulties eventually forced Yusuf to abandon his imperial designs on Bornu.¹⁸⁷

3. Early Ottoman Initiatives and Disturbances from the East, 1835-1900

After Constantinople deposed the Karamanlis in 1835 and began to govern Libya directly,¹⁸⁸ the Ottomans embarked on "a phase of effective conquest of territory."¹⁸⁹ They quickly discovered "that the tribes [of the interior], while quite willing to pay homage to the Sultan and Constantinople, were quite unwilling to pay his taxes or submit to his authority."¹⁹⁰ Nevertheless, Ottoman forces inflicted a major defeat on the 'Awlad Sulaiman at 'al-Baghlah in 1842, killing 'Abd-al-Jalil and forcing the tribe to leave Fazzan for the south.¹⁹¹ While the Turks pushed onward to Fazzan and Ghadamis,¹⁹² the 'Awlad Sulaiman eventually established themselves as roaming freebooters beyond the Ottoman reach in Kanem; they controlled the strategic trans-Saharan trade and even encroached on the territory of Ouadai, before they

182. WRIGHT, CENTRAL SAHARA, *supra* note 26, at 71; Rossi, *Penetrazione*, *supra* note 161, at 154; *see also* CLINE, *supra* note 18, at 21.

183. CHAPPELLE, PEUPLE TCHADIEN, *supra* note 46, at 210-11; WRIGHT, CENTRAL SAHARA, *supra* note 26, at 71.

184. FOLAYAN, *supra* note 173, at 83-84.

185. *Id.* at 84, 89.

186. WRIGHT, CENTRAL SAHARA, *supra* note 26, at 64-66; *see also* FOLAYAN, *supra* note 173, at 91-92.

187. FOLAYAN, *supra* note 173, at 97-100.

188. *See* MORSY, *supra* note 173, at 130; E.G.H. Joffé, *Social and Political Structures in the Jafara Plain in the Late Nineteenth Century*, in *SOCIAL AND ECONOMIC DEVELOPMENT OF LIBYA* 19, 28-32 (E.G.H. Joffé & J.S. McLachlan eds., 1982).

189. Rossi, *Penetrazione*, *supra* note 161, at 155.

190. WRIGHT, CENTRAL SAHARA, *supra* note 26, at 73.

191. CHAPPELLE, NOMADES NOIRS, *supra* note 15, at 60-61. The Toubous participated in this struggle against the Turks. DESIO, *supra* note 16, at 151. Indeed, one of 'Abd-al-Jalil's sisters was married to a Toubou notable. WRIGHT, CENTRAL SAHARA, *supra* note 26, at 73.

192. Rossi, *Penetrazione*, *supra* note 161, at 155.

were finally defeated by the Tuaregs in what is now northern Niger.¹⁹³ By retaining links with other members of their tribes who remained in Fazzan, the 'Awlad Sulaiman strengthened commercial ties between Libya and the areas they raided.¹⁹⁴ Notably, however, they never ventured into the Tibesti massif.¹⁹⁵

Despite their victories in Fazzan the Ottomans proved unsuccessful in subduing Tibesti and in obtaining recognition of their authority in neighboring areas. As Rossi noted, their attempts to penetrate into the interior and set up an administrative structure were "neither guided by a definite plan nor sustained by an adequate policy."¹⁹⁶ The Sultan's 1853 prohibition of slavery went completely unenforced.¹⁹⁷ Although Ahmed Izzet Paşa, the governor of Tripoli, took some measures in 1858 to extend Ottoman protection over Tibesti, his act "had only the significance of a political aspiration and was not followed by tangible results."¹⁹⁸ Sultan 'Abd-al-'Aziz, through Ali Riza Paşa, the governor of Tripoli, sent a sword of honor and a manuscript to the Sultan of Bornu in 1869,¹⁹⁹ but this act was little more than symbolic. Traveling through southern Fazzan and Tibesti in 1869-1874, Gustav Nachtigal reported that the inhabitants did not mention any effective Turkish sovereignty over Tibesti.²⁰⁰

A later governor of Tripoli, Mehmed Nazif Paşa, suggested sending an armed garrison to Tibesti, but no action followed this proposal.²⁰¹ His suggestion coincided with the creation in 1879 of two new *kazas* (administrative subunits), one for the Ajjer Tuareg and one for the Toubou Reshada (literally, "Toubous of the rocks," meaning Toubous of Tibesti²⁰²), by Mustafa Faiq Paşa, the *mutasarraf* (lieutenant governor) of Fazzan.²⁰³ However, "neither of these had any existence in practice,"²⁰⁴ and Mehmed Nazif's successor in Tripoli, Ahmed Rasim Paşa, removed Mustafa Faiq in 1881 and reproached him for "having wasted money through ambitions and having followed fantastic plans with the pretense of subjecting all of the Sudan [to Turkish rule] through

193. CHAPELLE, PEUPLE TCHADIEN, *supra* note 46, at 210; CLINE, *supra* note 18, at 20; MORSY, *supra* note 173, at 269; WRIGHT, CENTRAL SAHARA, *supra* note 26, at 74; Wright, *Historical Connections*, *supra* note 25, at 92.

194. WRIGHT, CENTRAL SAHARA, *supra* note 26, at 70, 76.

195. *Id.* at 75.

196. Rossi, *Penetrazione*, *supra* note 161, at 156.

197. *Id.* at 159.

198. ROSSI, STORIA, *supra* note 161, at 338; Rossi, *Penetrazione*, *supra* note 161, at 159; *see also* WRIGHT, CENTRAL SAHARA, *supra* note 26, at 113.

199. *Les aspirations*, *supra* note 161, at 325; *see also* ROSSI, STORIA, *supra* note 161, at 339.

200. ROSSI, STORIA, *supra* note 161, at 338; Rossi, *Penetrazione*, *supra* note 161, at 159; *see also* WRIGHT, CENTRAL SAHARA, *supra* note 26, at 113.

201. ROSSI, STORIA, *supra* note 161, at 340; *see also* Rossi, *Penetrazione*, *supra* note 161, at 160. A similar proposal in 1900 met a similar fate. *See infra* note 270 and accompanying text.

202. 1 NACHTIGAL, *supra* note 25, at 343; *see also* CLINE, *supra* note 18, at 11.

203. WRIGHT, CENTRAL SAHARA, *supra* note 26, at 113; Rossi, *Penetrazione*, *supra* note 161, at 159.

204. WRIGHT, CENTRAL SAHARA, *supra* note 26, at 113.

grants of stipends to the chiefs."²⁰⁵ The Turks thus did not perceive themselves as possessing sovereignty over Tibesti at this point. Years of inaction followed this incident, until the Tuaregs around Ghat revolted in 1886 and murdered the Turkish garrison there.²⁰⁶ The French consul in Tripoli reported in 1890 that none of the heads of the regions Turkey claimed in its 1890 note had ever recognized Turkey's 1835 seizure of Tripoli, and that they all refused to communicate directly with the Constantinople government.²⁰⁷

Thus, at the time the Sultan issued his note protesting the Anglo-French agreement of 1890, the nearest Turkish troops were some 1500-2000 kilometers (900-1200 miles) from the southernmost boundary claimed by Turkey.²⁰⁸ This fact, coupled with the collapse of Bornu and the raiding of the 'Awlad Sulaiman, produced a state of disorder that was exploited by Zubair Rahma Mansur, an Egyptian merchant prince with a private army. In the space of two years Zubair overran Darfur and became *Pasha* in 1874. Although Zubair was shortly afterward captured and held prisoner in Cairo, his son Sulaiman ruled the principality and expanded it westward. Sulaiman's reign, too, was short; in 1879, he surrendered to an Egyptian military expedition and was shot.²⁰⁹

At this point an associate of Sulaiman named Rabih ibn Fadl Allah fled to the Lake Chad area. Rabih rapidly overran the region and set up an independent principality there in 1893-1894, destroying "what remained of Bornu sovereignty."²¹⁰ Launching a religious movement similar to that of the Mahdi in Sudan, Rabih attempted to stave off French intrusions into the Chad area. In 1900, he died in battle with three French columns that had converged at Kousseri on the shores of Lake Chad.²¹¹

4. *The Sanusi*

After subduing the sons of Rabih, the French encountered a new foe: the Sanusi religious brotherhood.²¹² Founded in Cyrenaica during the 1840s, and

205. Rossi, *Penetrazione*, *supra* note 161, at 160. Interestingly, this tactic was exactly the one used by the Turks to establish a foothold in Tibesti after 1906. *See infra* notes 275-278 and accompanying text.

206. Rossi, *Penetrazione*, *supra* note 161, at 160.

207. *See* Note to the Minister of Foreign Affairs (Feb. 1899), in 15 D.D.F. (ser. 1) No. 98, at 155-56 (1959).

208. WRIGHT, CENTRAL SAHARA, *supra* note 26, at 115. Wright asserts that the claims did not reflect "any present reality or even future possibility" and that the greater part of them were "clearly fanciful." *Id.* at 114, 115.

209. MORSY, *supra* note 173, at 223-24.

210. *Id.* at 224.

211. CHAPELLE, PEUPLE TCHADIEN, *supra* note 46, at 214-19; FERRANDI, *supra* note 18, at 2-4; MORSY, *supra* note 173, at 223-24 (giving date as 1901, while all other sources give 1900); NELSON, *supra* note 72, at 31; Gen. P. Mangeot, *L'Ephémère aventure turque au Tibesti, au Borkou et dans l'Ennedi*, 40 B.C.A.F. 326, 327 (1930); *see also* BOUQUET, *supra* note 174, at 50-51, 66-68; THOMPSON & ADLOFF, *supra* note 45, at 9.

212. *See* BOUQUET, *supra* note 174, at 70.

emphasizing a return to a stricter and purer form of Islam, the Sanusiya expanded southward during the late nineteenth century, while the French were pushing northward from central Africa.

a. *Origins and Spread of the Order from 1856 to the late 1890s*

Islam had penetrated northern Chad gradually and unevenly. The Muslim world's traveling diplomats, merchants, scholars, and geographers brought Islam to Lake Chad from the north,²¹³ and the Islamic world was aware of Kanem from at least the twelfth century onward. Ibn Sa'īd, in the thirteenth century, reported that Kanem was predominantly Islamic.²¹⁴ However, Islam did not take hold in Ouadai until the seventeenth century, and in Tibesti until the nineteenth.²¹⁵ The Toubous still practice forms of Islam that are imbued with various elements of animism.²¹⁶

The founder of the Sanusiya, Muhammad Ibn-°Ali al-Sanusi, was born in Algeria in the late eighteenth century. His lineage was sherifian; i.e., he was descended from the Prophet's daughter Fatimah. He could also claim descent from the Moroccan dynasty. Educated in Fez, 'al-Sanusi spent several years in Mecca, where he founded the order, before returning to Cyrenaica.²¹⁷ In 1856, 'al-Sanusi moved the headquarters of the Sanusiya to 'al-Jaghub, a location in the desert approximately 160 kilometers south of Tobruk and beyond the reach of both Egypt and Tripoli.²¹⁸ By the 1850s the Sanusiya

213. See CHAPELLE, *PEUPLE TCHADIEN*, *supra* note 46, at 149-50; LANE, *supra* note 11, at 27-28.

214. CHAPELLE, *PEUPLE TCHADIEN*, *supra* note 46, at 58. According to a history known as the *Bornu Chronicle*, Kanem converted to Islam in the late eleventh century. COMBY, *supra* note 162, at 0.

215. See, e.g., BRIGGS, *supra* note 29, at 188. In 1798, the German explorer Frederick Hornemann, traveling across Cyrenaica, reported information on pagan Toubous. CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 9. Some scholars attribute the arrival of Islam to the 'Awlad Sulaiman, who fled Fazzan in the mid-nineteenth century to avoid Turkish repression. See THOMPSON & ADLOFF, *supra* note 45, at 5, 7. Others attribute it to the "determined missionary efforts" of the Sanusi in the nineteenth century. See BRIGGS, *supra* note 29, at 188. Since that time the presence of the Sanusi and other *marabouts* among the Toubous has decreased markedly. See *id.*

216. For example, the Toubous still participate in animistic rites for planting, date harvesting, and rain-making. Islam has not deterred the Toubous from using alcoholic drinks, from adhering to the pre-Islamic custom of trial by ordeal, or from observing their clan-specific taboos. See CHAPELLE, *PEUPLE TCHADIEN*, *supra* note 46, at 150-51; CHAPELLE, *NOMADES NOIRS*, *supra* note 15, at 362, 380-91; see also BECK & HUARD, *supra* note 39, at 90-94; BRIGGS, *supra* note 29, at 188-89; LEBEUF, *supra* note 181, at 29-30. The French officer Réquin went so far as to say that the Teda of Tibesti "are not, properly speaking, Muslims." According to Réquin the Muslim rites used by the Teda are superficial displays of piety, while the strength and persistence of pagan beliefs and rituals are much more important. Réquin II, *supra* note 111, at 263.

217. For a more detailed account of al-Sanusi's formative years, see HENRI DUVEYRIER, *LA CONFRÉRIE MUSULMANE DE SIDI MOHAMMED BEN 'ALĪ ES-SENOÛSĪ ET SON DOMAINE GÉOGRAPHIQUE EN L'ANNÉE 1300 DE L'HÉGIRE = 1883 DE NOTRE ÈRE 4-5* (Paris, Société de Géographie 1886); MOHAMMED BEN OTSMANE EL-HACHAÏCHI, *VOYAGE AU PAYS DES SENOÛSSIA 84-86* (V. Serres & Lasram trans., 1903); NICOLA A. ZIADEH, *SANUSIYAH: A STUDY OF A REVIVALIST MOVEMENT IN ISLAM 35-46* (1958).

218. E.E. EVANS-PRITCHARD, *THE SANUSI OF CYRENAICA 14* (1949); MORSY, *supra* note 173, at 276; ZIADEH, *supra* note 217, at 48-49.

had a strong line of defenses set up at oases along the twenty-ninth parallel. The movement spread southward into the Sahara from these bases, ultimately reaching Tibesti and Kufrah.²¹⁹ As the order's center of gravity shifted southward, so did its headquarters: to Kufrah in 1894, and to Gouro, in the Tibesti massif, in 1899—well south of the borders presently claimed by either Chad or Libya.²²⁰

The southward move of Sanusi influence served another purpose of the order: independence from Turkish control.²²¹ Although the Sanusi despised the encroaching European powers,²²² especially the French, they had no love for the Turks.²²³ First, the Sanusi rejected the Sultan's claims to the leadership of the entire Muslim community.²²⁴ More generally, in the words of a contemporary, the "Sanusi detest[ed] the Turks, whom they consider[ed] poor Muslims."²²⁵ One Sanusi leader reportedly cursed the Ottomans, wishing that the Europeans would conquer every land that the Turks occupied.²²⁶

After the death of 'al-Sanusi in 1859 his two sons, Muhammad al-Mahdi and Muhammad al-Sharif, assumed the leadership of the order. Over the next forty years the number of *zawiyahs* (lodges) quadrupled, with the greatest expansion occurring in the Sahara.²²⁷ The Sanusi exploited a symbiotic relationship with the trans-Saharan trade, constructing *zawiyahs* that provided security for the caravan routes and also expanded the order's influence.²²⁸ The oasis at Kufrah, equidistant from Banghazi and Abéché in Ouadai, was a critical center of commerce and remained so until France and Italy conquered the territories it served.²²⁹ Control over this trade, and the ability to use their

219. MORSY, *supra* note 173, at 278.

220. See Wright, *Historical Connections*, *supra* note 25, at 93.

221. See 1 CARBOU, *supra* note 34, at 134; ROSSI, STORIA, *supra* note 161, at 327.

222. The Sanusi reportedly promised paradise to anyone who would kill the German explorer Gustav Nachtigal during his travels in the Fazzan between 1869 and 1874. See *infra* note 248 and accompanying text.

223. 1 CARBOU, *supra* note 34, 131 (quoting LOUIS RINN, MARABOUTS ET KHOUÂN (Algiers, A. Jourdan 1884)).

224. MORSY, *supra* note 173, at 281.

225. 1 CARBOU, *supra* note 34, at 144; see also ROSSI, STORIA, *supra* note 161, at 327 ("the Sanusi could not bring themselves to submit to the direction of the more tolerant and less religiously observant Turks"), 342 ("the Sanusi harbored a certain aversion to the Turks as infidels").

226. HACHAÏCHI, *supra* note 217, at 106-07; see also 1 CARBOU, *supra* note 34, at 144 n.1.

227. MORSY, *supra* note 173, at 279.

228. See Emrys L. Peters, *Cultural and Social Diversity in Libya*, in LIBYA SINCE INDEPENDENCE 103, 109-10 (J.A. Allan ed., 1982); see also GLAUCO CIAMMAICHELLA, LIBYENS ET FRANÇAIS AU TCHAD (1897-1914): LA CONFRÉRIE SENOUSSE ET LE COMMERCE TRANSSAHARIEN *passim* (1987); EVANS-PRITCHARD, *supra* note 218, at 16; WRIGHT, CENTRAL SAHARA, *supra* note 26, at 97-108.

229. Wright, *Historical Connections*, *supra* note 25, at 93.

influence to end raids against local populations,²³⁰ brought the Sanusi considerable power.²³¹

Building upon this influence, 'al-Sanusi and then his sons concluded several political alliances, the first with the Sultan of Ouadai, who had met 'al-Sanusi in Mecca in the 1830s.²³² "The eastern Sahara sultanates were all to pass under Sanusi influence and were to resist not only European encroachments but also those of the Mahdiyya."²³³ The 'Awlad Sulaiman were also "progressively brought under Sanusi influence" in this manner.²³⁴ Muhammad al-Mahdi won over the Sultan of Borku and continued to expand and consolidate Sanusi power between Fazzan and Lake Chad. By the late 1870s, when the order had established a *zawiyah* at Ain Galakka, the *'ikhwan* (brothers) of the order had extended its influence over more than half of the Sahara.²³⁵

The Sanusi had made some inroads in Tibesti, but they were unable to overcome the Toubous' independence. Although Duveyrier claimed the Sanusi arrived in Tibesti as early as 1870 and built a *zawiyah* at Bardai,²³⁶ this seems unlikely. Nachtigal did not notice a Sanusi presence during his stay in Tibesti and reported that the nearest *zawiyah* was in Fazzan.²³⁷ Instead, the Sanusi penetrated Tibesti only "after encircling the massif with *zawiyahs*."²³⁸ *Derde* Chai Bogarmi and other Teda from Tibesti visited the Sanusi at 'al-Jaghub in the early 1890s and at Kufrah in the late 1890s. They returned to Tibesti with Sanusi *'ikhwan*, who conducted missionary efforts to revitalize Islam among the Toubous.²³⁹ However, Chai balked when they interfered with the administration of justice (a traditional role of the *Derde*), and the Sanusi envoys had to be recalled.²⁴⁰

230. See, e.g., CIAMMAICHELLA, *supra* note 228, at 45; Letter from Muhammad bin Ali al-Sanusi to the People of Ounianga (Nov. 20, 1849 (4 Muharram 1266)), in FORBES, *supra* note 181, at 335-36 (reporting dispatch of delegates "to make peace between you and the Arabs who invade you and take your sons and your money").

231. See CIAMMAICHELLA, *supra* note 228, at 43-60; see also 1 CARBOU, *supra* note 34, at 137; EVANS-PRITCHARD, *supra* note 218, at 21.

232. EVANS-PRITCHARD, *supra* note 218, at 16; WRIGHT, CENTRAL SAHARA, *supra* note 26, at 86-88; ZIADEH, *supra* note 217, at 49-50. However, the extent of the Sanusi influence in Ouadai may have been exaggerated by scholars. See WRIGHT, CENTRAL SAHARA, *supra* note 26, at 87-88.

233. MORSY, *supra* note 173, at 276. The Sanusi rejected the Mahdi's orders to appoint him Caliph, declaring him instead an impostor. *Id.* at 280.

234. *Id.* at 277.

235. *Id.* at 281-82; B.G. MARTIN, MUSLIM BROTHERHOODS IN NINETEENTH-CENTURY AFRICA 119 (1976).

236. See DUVEYRIER, *supra* note 217, at 45-46, 70-71.

237. 1 NACHTIGAL, *supra* note 25, at 404. In addition, Duveyrier consistently portrayed the Sanusiya as an urgent threat to French expansion in the Sahara, and most scholars today recognize his assertions as exaggerated and biased in this regard. See EVANS-PRITCHARD, *supra* note 218, at 6; MARTIN, *supra* note 235, at 121; WRIGHT, CENTRAL SAHARA, *supra* note 26, at 84-85; ZIADEH, *supra* note 217, at 91-92.

238. WRIGHT, CENTRAL SAHARA, *supra* note 26, at 96.

239. CHAPELLE, NOMADES NOIRS, *supra* note 15, at 93-96; CLINE, *supra* note 18, at 21; WRIGHT, CENTRAL SAHARA, *supra* note 26, at 96-97.

240. Allan G.B. Fisher & Humphrey J. Fisher, *Tibesti Since Nachtigal's Visit*, in 1 NACHTIGAL, *supra* note 25, at 427; see also WRIGHT, CENTRAL SAHARA, *supra* note 26, at 97.

b. *The Extent of Sanusi Influence: An Assessment*

While the Sanusiya was primarily a religious brotherhood, it wielded significant political influence. The Sanusi formed a "semi-independent state"²⁴¹ and exercised "effective command of the region."²⁴² Surprisingly, the movement's power did not upset the Ottoman governors of Tripoli. Instead, by allowing the Sanusi to expand and to exercise control over the regions south of Cyrenaica and Fazzan, the Turks used the movement to extend their own influence over these areas.²⁴³ One Italian historian has gone so far as to say that, despite the hostility of the order, "the Ottoman Sultan could count on [the Sanusiya] to strengthen his position in Tripolitania and Cyrenaica."²⁴⁴ Especially after 1908, the Turks "turned to their own advantage the Muslim and xenophobic preaching [of the Sanusi] against the menace of the French advance."²⁴⁵

It is difficult to assess the Sanusi attitude toward Europeans. European contemporaries described the Sanusi as implacably opposed to any European presence and accused the order of numerous massacres and other atrocities against Europeans.²⁴⁶ Nachtigal described the Sanusi as "red-hot Christian-haters"²⁴⁷ and wrote that a Sanusi missionary incited the local population "openly to murder me, . . . preaching in general the murder of a Christian as an assured title to the delights of Paradise."²⁴⁸ On the other hand, Ziadeh emphasizes that the Sanusi were originally a religious, not political, revival movement, and that the order's doctrine stressed emigration rather than violent resistance to the European advance.²⁴⁹ According to Nachtigal, in 1870 the Sanusi not only sought to revive Islam among those who had become "slack," but also "particularly directed their attention to the inhabitants of the eastern desert, who, whether nominal Muslims or Pagans, [were] much in need of instruction."²⁵⁰ It was "only as a response to foreign incursions into their

241. ROSSI, STORIA, *supra* note 161, at 342.

242. 1 CARBOU, *supra* note 34, at 144.

243. See ROSSI, STORIA, *supra* note 161, at 342; see also 1 CARBOU, *supra* note 34, at 144. In 1895 an emissary of Sultan Abdülhamid II visited Muhammad al-Mahdi at Kufrah and returned with a letter to the Sultan from the Sanusi leader. ROSSI, STORIA, *supra* note 161, at 343.

244. ROSSI, STORIA, *supra* note 161, at 327.

245. *Id.* at 342-43; see also *infra* notes 297-329 and accompanying text. Until 1908 the Sanusi disfavored offensive action against the French. CIAMMAICHELLA, *supra* note 228, at 92.

246. See, e.g., DUVEYRIER, *supra* note 217, at 14-15; Capt. Mangin, *Les derniers secrets du centre africain*, 7 DÉPÊCHE COLONIALE ILLUSTRÉE 177, 177 (1907) (providing examples of Sanusi hostility to European travelers and officers).

247. 1 NACHTIGAL, *supra* note 25, at 178.

248. 2 *id.* at 386.

249. ZIADEH, *supra* note 217, at 90-91; see also Knut S. Vikør, *Al-Sanusi and Qadhafi—Continuity of Thought?*, 12 MAGHREB REV. 25, 25 (1987).

250. 1 NACHTIGAL, *supra* note 25, at 176.

domains" that the Sanusi became "a fighting order."²⁵¹ Ziadeh and others therefore caution against taking French and Italian accounts of Sanusi hostility and fanaticism too literally.²⁵² It seems safe to conclude that the Sanusiya displayed hostility to Europeans and actively resisted their advance once it perceived a real threat to the spread and preservation of Islam in the Sahara.

The degree of political influence actually exercised by the Sanusi is a matter of some uncertainty. The order itself had little military importance and usually used its spiritual authority to incite local populations to take up arms against European colonial expansion.²⁵³ However, some have portrayed the Sanusi as a "semi-independent state,"²⁵⁴ and the French themselves admitted that the Sanusi performed acts of administration, such as levying tithes. The size of the Sanusi following resists precise estimation, since it always increased in the face of threatened European expansion. Contemporary estimates placed the number of adherents at nearly three million, but the overwhelming majority of this following lived in Cyrenaica and Tripolitania.²⁵⁵

The arrival of French forces pushing northward from the French Congo into Kanem tested the depth and extent of Sanusi influence. When the ruler of Kanem entered into relations with the French explorer Joalland, Muhammad al-Mahdi sent a deputy to Kanem from the Sanusi headquarters at Gouro. This deputy, Muhammad Sunni, had the Kanemi ruler killed and then constructed a *zawiyah* at Bir Alali, on the northeast shore of Lake Chad, in 1896.²⁵⁶ Situated more than 800 kilometers south of Aouzou, this *zawiyah* marked the southernmost limit of Sanusi expansion. Muhammad Sunni left the fort under the command of his lieutenant, Muhammad al-Barrani, and then returned to Ouadai; the Sanusi, however, occupied Bir Alali only briefly. Although Tuareg and 'Awlad Sulaiman forces under Sanusi leadership repulsed an initial French assault on the *zawiyah* in November 1901, French forces succeeded in capturing it the following January. Al-Barrani fled to Ain Galakka, 600 kilometers to the north.²⁵⁷

The taking of Bir Alali rendered the Sanusi position in Kanem untenable. A third battle near Bir Alali in December 1902 killed 'al-Barrani's successor,

251. Vikør, *supra* note 249, at 26; see also Letter from Muhammad ibn-^oAli al-Sanusi to the People of Ounianga (Nov. 20, 1849 (4 Muharram 1266)), in FORBES, *supra* note 181, at 335-36 (stressing importance of adhering to requirements of Islam, and reporting dispatch of "ikhwān to Kufrah to "teach you and your sons of the Book of God and the tradition of his Prophet, Mohammed" in fulfillment of Sanusi mission "to remind the negligent, teach the ignorant, and guide him who has gone astray").

252. See, e.g., ZIADEH, *supra* note 217, at 91-92; see also MARTIN, *supra* note 235, at 121; WRIGHT, CENTRAL SAHARA, *supra* note 26, at 84-85.

253. Wright, *Historical Connections*, *supra* note 25, at 94; see also BOUQUET, *supra* note 174, at 85.

254. See *supra* notes 241-242 and accompanying text.

255. Compare MORSY, *supra* note 173, at 280 with EVANS-PRITCHARD, *supra* note 218, at 24-25.

256. See Mangeot, *supra* note 211, at 327; see also FERRANDI, *supra* note 18, at 7.

257. LANNÉ, *supra* note 11, at 32; see also FERRANDI, *supra* note 16, at 8, 14; MORSY, *supra* note 173, at 315; Mangeot, *supra* note 211, at 328.

and the Sanusi evacuated Kanem.²⁵⁸ Muhammad al-Mahdi had died at the end of 1901; his nephew and successor, Ahmad al-Sharif, abandoned Gouro and re-established the Sanusi headquarters at Kufrah.²⁵⁹

5. Summary

By the turn of the century, then, the area presently constituting northern and central Chad had undergone a series of disruptions; neither the French nor the Ottomans had exercised power resembling continuous control. While some of the 'Awlad Sulaiman, hostile to Turkish rule, migrated from Fazzan and the regions immediately to the south, Zubair and then Rabih invaded Kanem and Borku. Rabih's empire quickly fell to the French forces arriving from the south, and the French thereafter drove the Sanusi from central Chad.

Although Turkish troops had reconquered Fazzan by the end of the 1870s, their control over the area was tenuous and certainly did not extend south of the area. The hostility of the 'Awlad Sulaiman precluded any attempts to extend influence by conquest or by relations of tribute. Nor could the Ottomans rely on the Sanusi for support. Although the Sanusi shared Turkey's interest in resisting European expansion, their relations with the Sublime Porte were hardly cordial.

B. *The Turkish Presence and the First French Occupation of B.E.T., 1900-1916*

In 1898 and 1899, France and Great Britain signed agreements under which Britain allowed France free rein in acquiring control over Kanem, Ouadai, Tibesti, Borku, and Ennedi.²⁶⁰ However, French forces did not penetrate

258. L'ANNE, *supra* note 11, at 32.

259. *Id.*

260. See *infra* notes 788-822. At this time the Porte renewed the protests it had made in 1890, again asserting its rights to territory extending as far as Lake Chad. See Letter from Mûnir Bey, Turkish Ambassador to France, to Théophile Delcassé, Minister of Foreign Affairs (May 19, 1899), in 15 D.D.F. (ser. 1) No. 179, at 293-98 (1959); Dispatch from Théophile Delcassé, Minister of Foreign Affairs, to Ambassadors to Turkey and Italy (Apr. 1, 1899) in 15 D.D.F. (ser. 1) No. 127, at 198 (1959) (reporting receiving note of protest from Mûnir Bey dated Mar. 19, 1899).

France responded, as it had in 1890, that it had no designs on the Sultan's rights or possessions in Tripolitania, but it refused to concede a Tripolitanian hinterland extending to the regions Turkey claimed. *Id.* France also denied that the Sultan's status as the chief religious figure of Islam could create any right of sovereignty over the regions claimed, and asserted that the hinterland "is not a principle of international law but an ensemble of considerations of fact, of a geographic, political, commercial or other order." Dispatch from Théophile Delcassé, Minister of Foreign Affairs, to Ambassador Constans (May 29, 1899) in 15 D.D.F. (ser. 1) No. 191, at 317-19 (1959).

Anticipating Turkish protests, France and Britain had structured the agreement in a way that they felt would preclude dispute. Paul Cambon, the French Ambassador to Britain, suggested leaving "a certain hinterland to Tripolitania," to which British Prime Minister Lord Salisbury assented. See Telegram from Paul Cambon, French Ambassador to Britain, to Théophile Delcassé, Minister of Foreign Affairs (Jan. 18, 1899), in 15 D.D.F. (ser. 1) No. 25, at 39 (1959).

even the southernmost of these areas until late 1901, and France did not occupy northern Tibesti until 1914, because of Sanusi and Turkish resistance. The French delay enabled Turkey to occupy parts of Borku, Tibesti, and Ennedi, and thus created some of the circumstances giving rise to the present dispute.

1. *Early French Probes, 1902-1909*

Although the Sanusi withdrew from Kanem in 1902, they did not relinquish Borku. From posts at Ain Galakka, Faya, Yarda, and Ounianga Kebir, the Sanusi "maintained a thick curtain of protection" using 'Awlad Sulaiman, Tuareg, and Teda tribes, and directed a series of raids against the French in Kanem. In response the French created a platoon of *méharistes* (soldiers mounted on camels).²⁶¹ Counterraiding by French forces took them to Faya in June 1906. Another French unit attacked and briefly held Ain Galakka in April 1907, not far to the northeast and approximately 400 kilometers south of the frontier now claimed by Chad.²⁶² These expeditions were temporary and did not lead to a permanent occupation of Borku; the Sanusi rebuilt the forts shortly afterward. In 1908, further raiding provoked a second French expedition to Ain Galakka.²⁶³ During these years, the French were consolidating their hold on Ouadai, formerly a close ally of the Sanusiya.²⁶⁴

Italy also protested the convention and requested that France disavow any designs on Tripolitania. See Dispatch from Ambassador Barrère to Théophile Delcassé, Minister of Foreign Affairs (Apr. 4, 1899), in 15 D.D.F. (ser.1) No. 130, at 202 (1959). French Minister of Foreign Affairs Delcassé responded that in avoiding making a delimitation north of the Tropic of Cancer, "we left outside our accords all the regions that one could reasonably consider as depending on Tripolitania." Delcassé also reassured Italy that France had no designs on Tripolitania or its reasonable hinterlands. Dispatch from Théophile Delcassé, Minister of Foreign Affairs, to Ambassador Barrère (Apr. 5, 1899), in 15 D.D.F. (ser.1) No. 131, at 202-03 (1959); Dispatch from Théophile Delcassé, Minister of Foreign Affairs, to Ambassador Barrère (Apr. 11, 1899), in 15 D.D.F. (ser.1) No. 135, at 207-09 (1959). Admiral Canevaro, the Italian Minister of Foreign Affairs, seemed to accept these assurances. In a speech to the Italian Senate later that month he asserted that Turkey's claimed hinterland was "exaggerated" and had no international legal value, as it was not based on any diplomatic arrangement. PICHON, *supra* note 161, at 65, 81.

See generally *L'Arrangement anglo-français, l'Italie et la Porte*, 9 B.C.A.F. 141, 141-42 (1899) [hereinafter *L'Arrangement*]; see also LANNE, *supra* note 11, at 27.

261. FERRANDI, *supra* note 18, at 14-15.

262. LANNE, *supra* note 11, at 32, 60; see also Ferrandi, *Oasis et nomades*, *supra* note 21, at 4.

263. LANNE, *supra* note 11, at 32, 43, 75-76; see also FERRANDI, *supra* note 18, at 22.

264. See MORSY, *supra* note 173, at 315; Wright, *Historical Connections*, *supra* note 25, at 94; see also Ferrandi, *La vérité*, *supra* note 24, at 392; Mangeot, *supra* note 211, at 328.

In 1902 the Sanusi had pushed Ouadai, which had earlier concluded an alliance with the French officer Gentil, to take a more aggressive stance against the French. In 1906 Ahmad al-Sharif intervened in Darfur to end its attacks on neighboring Ouadai so as to allow Ouadai to devote its full attention to halting the French advance. See LANNE, *supra* note 11, at 33.

French forces occupied Oum Chalouba for nine days in 1909 and forced the Anakazza, the local Toubou clan, to swear never to take up arms against the French again. FERRANDI, *supra* note 18, at 22. The French had little hope that the Anakazza would honor their oath.

After taking Abéché, the capital of Ouadai, in June 1909, France sought to maintain the territorial status quo rather than acquire additional land. Even before the capture of the town, French Minister of Colonies Georges Trouillot had stated, "the taking of Abéché will mark the end of our occupations of territory."²⁶⁵ In November, Jean Morel, the new Minister of Colonies, informed the Chamber of Deputies that France had no present intention of expanding beyond Ouadai. He also added, however, that France would not abandon any territory it legitimately owned.²⁶⁶

2. The Initial Turkish Response, 1900-1909

The French advance did not go unnoticed in Constantinople. Indeed, according to one historian, the Turks were preoccupied with the French push into the Sahara.²⁶⁷ An officer of the Turkish General Staff presented to the Sultan a study in 1888 advocating the use of Tripoli and Benghazi as basing points for Islamic expansion into the interior.²⁶⁸ The study certainly influenced the Sultan's 1890 note of protest. The Porte's protest following the Franco-British agreement demonstrated Turkey's continued interest in the interior, although Turkey does not seem to have pressed its claims vigorously.²⁶⁹

In 1900, Mahmud Bey, the *mutasarrif* of Fazzan, wrote to Tripoli noting with alarm the French advance to Tuat and suggesting the establishment of Turkish administration over the Toubous as a means of preempting the French. Mahmud Bey noted that the division of the Toubous into two "tribes" centered in Kavar and Tibesti lent itself naturally to the creation of two *kazas*. He proposed installing a battalion of troops in Tibesti and constructing a barracks there.²⁷⁰ This proposal, like the ill-fated attempts of Mustafa Faiq Paşa to send an armed garrison to Tibesti,²⁷¹ implies that Turkey did not believe that it exercised sovereignty over Tibesti. The Turks began to assert a greater military presence in the region at the same time. In 1899, the French consul in Tripoli reported Turkish expeditions to punish the Toubous for depredations committed against caravans. The Turks were also considering permanently occupying some points along the caravan route linking Kavar and Kanem.²⁷²

265. L'ANNE, *supra* note 11, at 60.

266. *Id.* at 61.

267. Rossi, *Penetrazione*, *supra* note 161, at 163.

268. *Id.* at 161.

269. L'ANNE, *supra* note 11, at 27; W.B.K. Shaw, *International Boundaries of Libya*, 85 GEOGRAPHICAL J. 50, 51 (1935).

270. Rossi, *Penetrazione*, *supra* note 161, at 163.

271. See *supra* notes 201-205 and accompanying text.

272. See Note to the Minister of Foreign Affairs (Feb. 1899) in 15 D.D.F. (ser. 1) No. 98, at 155-56 (1959).

At about this time, however, the Toubous inflicted a major defeat on Turkey's plans to extend sovereignty over Tibesti. Near Aouzou a force of several hundred Fazzanese, attempting to take possession of Tibesti, fell in a gruesome battle against Toubous led by *Derde Chai*.²⁷³ The Turks reportedly began making further moves around 1900, such as reinforcing garrisons in Fazzan (Ghadamis, Marzuq, and Ghat) and sending an expedition to Bilma in 1902.²⁷⁴

In 1906-1907, the Turkish government took additional action to counter the growing French influence by improving its relations with *Derde Chai*. Recep Paşa, the governor of Tripolitania, summoned Chai to Marzuq, where Chai agreed to the re-establishment of the *kaza* of the Toubou Reshada.²⁷⁵ In return for a promise to stop the Toubou raids against Ottoman positions and caravans plying the trade routes linking the Libyan coast with Bornu and Ouadai, Chai received a monthly payment "that had been his in old times,"²⁷⁶ some local administrative powers, and a pledge of aid against the French.²⁷⁷ Two soldiers and a flag accompanied him back to Bardai.²⁷⁸

However, the Turkish regalia were of little use to Chai in quelling disorder in Tibesti, and in 1909 or 1910 Chai, evidently feeling little loyalty to Tripoli or Constantinople, appealed to the French commandant in Bilma for assistance, after he had already submitted to the Turks.²⁷⁹ Chai also strengthened his ties to Turkey at the same time by cooperating in the establishment of Turkish garrisons at Zouar and Bardai.

273. Fisher & Fisher, *supra* note 240, at 425; see also LE COEUR, *LE RITE*, *supra* note 80, at 67-68; CHARLES LE COEUR, *MISSION AU TIBESTI: CARNETS DE ROUTE, 1933-1934*, at 174-75 (Marguerite Le Coeur ed., 1969) [hereinafter LE COEUR, *MISSION*]; Comarin, *supra* note 11, at 6. Although in his 1957 work Chapelle reported this incident as occurring in the first years of the twentieth century, his 1980 study dated it around 1810. Compare CHAPPELLE, *NOMADES NOIRS*, *supra* note 15, at 92-93 with CHAPPELLE, *PEUPLE TCHADIEN*, *supra* note 46, at 210.

274. ROSSI, *STORIA*, *supra* note 161, at 344; Rossi, *Penetrazione*, *supra* note 161, at 163; see also L'ANNE, *supra* note 11, at 30.

275. See *supra* notes 202-205 and accompanying text.

276. ROSSI, *STORIA*, *supra* note 161, at 345-46; Rossi, *Penetrazione*, *supra* note 161, at 164.

277. L'ANNE, *supra* note 11, at 37; see also CHAPPELLE, *NOMADES NOIRS*, *supra* note 15, at 93; WRIGHT, *CENTRAL SAHARA*, *supra* note 26, at 118.

278. LE COEUR, *LE RITE*, *supra* note 80, at 68; ROSSI, *STORIA*, *supra* note 161, at 345; Rossi, *Penetrazione*, *supra* note 161, at 164. Some have speculated that Chai decided to accept the Turkish troops as protection against the advancing French. See Comarin, *supra* note 11, at 6.

The Turks also considered placing a second Toubou chief, *Mai Chitmi*, on their payroll in order to stop his disruptive raids from eastern Tibesti on the trade between the Libyan coast and Ouadai. Under this plan Chitmi was to receive 200 piasters monthly, and Chai's stipend was to rise to 500 piasters. The same proposal also included the creation of a base at Bardai to be manned by fifty Turkish soldiers and financed by taxes levied on caravans. These plans, however, never came to fruition. Rossi, *Penetrazione*, *supra* note 161, at 164; see also ROSSI, *STORIA*, *supra* note 161, at 345.

279. *La France et la Turquie en Afrique*, 20 B.C.A.F. 290, 290-91 (1910) [hereinafter *La France et la Turquie*]; see also L'ANNE, *supra* note 11, at 38; 1 CARBOU, *supra* note 34, at 147. Chai's submission to both France and Turkey demonstrates concretely the difficulty of relying upon relations with the Toubous as a basis for title.

3. *Turkish Actions After the Young Turk Revolution, 1909-1912*

The seizure of power in 1908 by the reformist Young Turk movement brought a more active Ottoman policy to the region.²⁸⁰ An incident in March 1910 exemplified the new aggressiveness. A French officer encountered a Turkish lieutenant and detachment of soldiers escorting a caravan in French territory from al-Qatron to Bilma. Upon searching the caravan, the French discovered a raiding party of approximately sixty Toubous. The Turkish officer was bearing a safe-conduct pass from Sami Bey, the *mutasarrif* of Fazzan. The French press criticized the action as a violation of French rights.²⁸¹ In June 1910, Trouillot wrote to Minister of Foreign Affairs Stephen Pichon that France would not allow Turkish forces to cooperate with it in policing the Sahara until the raids then forming in Tripolitania ceased.²⁸²

Despite these efforts the Turkish authorities still faced resistance from the Sanusi and the local populations in the Libyan desert. In April 1908, for example, the Sanusi leader Muhammad al-Sharif wrote to Gouro to inform Muhammad Sunni, his lieutenant in charge of all the *zawiyahs* in Tibesti, Borku, and Ennedi, that two Turkish officials had "arrived at Kufrah, sent by the Turkish authorities to affirm the rights of the Porte over this area. The Zawiyah are opposed to their desire."²⁸³ The Sanusi joined the Zawiyah (or Zowaya) in rejecting even a purely formal recognition of Ottoman authority over the area.²⁸⁴

a. *The Arrival of Osman Efendi at Bardai*

In either 1908 or 1909, with the support of *Derde Chai*²⁸⁵ and at the urging of Sami Bey, governor of Fazzan, the Turks appointed a medical captain named Osman Efendi to be *kaymakam* at Bardai, to the southwest of

280. LANNE, *supra* note 11, at 33.

281. See *La France et la Turquie*, *supra* note 279, at 291; Rossi, *Penetrazione*, *supra* note 161, at 166; see also 1 CARBOU, *supra* note 34, at 147; LANNE, *supra* note 11, at 49. The Italian historian Ettore Rossi's version of the incident portrays it as a reflection of France's increased determination to wrest the region from the Turks and makes no mention of any concealed Toubou raiding party. See ROSSI, STORIA, *supra* note 161, at 347.

The Sanusi also continued to enlist the Toubous against the French. In 1909 the commander of the *zawiyah* at Ain Galakka, 'Abd-Allah Tuwwar (called Abadallah Tooueur by the French, and also known as 'Abd-Allah ibn-al-Fadhil), had fallen upon a French detachment and massacred it at Ouaschenkellé. See Mangeot, *supra* note 211, at 328; see also FERRANDI, *supra* note 18, at 25-26; LANNE, *supra* note 11, at 32.

282. LANNE, *supra* note 11, at 49.

283. Ferrandi, *La vérité*, *supra* note 24, at 394; see also LANNE, *supra* note 11, at 42; *Les pauvres turcs du Borkou!*, 38 B.C.A.F. 502, 502 (1928) [hereinafter *Les pauvres turcs*]. The Zawiyah was the Arab tribe that had driven the Toubous from Kufrah in the nineteenth century. See *supra* note 181 and accompanying text.

284. CIAMMAICHELLA, *supra* note 228, at 119-20.

285. CHAPPELLE, NOMADES NOIRS, *supra* note 15, at 93.

Aouzou. The Turks also acted on earlier proposals to establish small garrisons at Bardai and Zouar.²⁸⁶ According to Rossi, Osman won the favor of the local population and, with a local chief's help, extended Turkish sovereignty to Borku.²⁸⁷ The French were well aware of these actions; in March 1911 the *Bulletin du Comité de l'Afrique française* reported the presence of the Turkish garrison at Bardai and noted that the Turks had performed "acts of authority" there since 1909.²⁸⁸ Following French protests, France and Turkey agreed to refer the matter of the boundary between their possessions to a delimitation commission.²⁸⁹ Unfortunately, this commission never had a chance to meet, since the Italo-Turkish war erupted in October of that year,²⁹⁰ and so the question remained to trouble later generations. The boundary was the subject of negotiations between France and Italy during the 1930s²⁹¹ and France and Libya in the early 1950s.

In 1911, a French functionary in Cairo, Bonnel de Mézières, attempted to reach an understanding with the Sanusi regarding northern Chad. In an exchange of letters in which Bonnel de Mézières identified himself as a high official in the French government, he suggested a line drawn along the parallel at Arada (far south of the Aouzou), demarcating a Sanusi zone of influence to the north and a French zone to the south.²⁹² The Sanusi accepted this proposal, but the embarrassed French quickly recalled Bonnel de Mézières.²⁹³ In response to repeated Sanusi references to the agreement²⁹⁴ France claimed that the true boundary had been set by its 1899 sphere of

286. See *Les aspirations*, *supra* note 161, at 326; Ferrandi, *La vérité*, *supra* note 24, at 396. One contemporary described the Turkish garrison as "six poor devils with a flag." 1 CARBOU, *supra* note 34, at 146-47. Rossi, in contrast, puts the number of Turkish soldiers at 35. ROSSI, STORIA, *supra* note 161, at 346.

287. Rossi, *Penetrazione*, *supra* note 161, at 166.

288. Robert de Caix, *La question du Tibesti*, 21 B.C.A.F. 88, 88 (1911) [hereinafter de Caix, *La question*].

289. The commission was to be formed pursuant to a 1910 treaty fixing the boundary between Tunisia and Tripolitania. See Convention Respecting the Frontier Between Tunis and Tripoli, May 9, 1910, Tunis.-Turk., art. 3, 211 Consol. T.S. 130-131; Jacques Dorobantz, *Les turcs au Tibesti*, 32 QUESTIONS DIPLOMATIQUES ET COLONIALES 366 (1911); de Caix, *La question*, *supra* note 288, at 88; see also *La délimitation de la Libye*, 24 B.C.A.F. 15, 15 (1914).

290. See *infra* notes 316-318 and accompanying text.

291. See *infra* notes 898-921 and accompanying text.

292. Ferrandi, *La vérité*, *supra* note 24, at 395; see also CIAMMAICHELLA, *supra* note 228, at 121; FERRANDI, *supra* note 18, at 33.

293. CIAMMAICHELLA, *supra* note 228, at 121.

294. See, e.g., Telegram from Colonel Victor-Emmanuel Largeau to French Colonial Administration at Brazzaville (May 27, 1912), in CIAMMAICHELLA, *supra* note 228, at 152-53 (discussing letter received from 'Abd-Allah Tuwwar mentioning Bonnel de Mézières agreement); Telegram from Colonel Victor-Emmanuel Largeau to French Ministry of Colonies (June 6, 1912), in CIAMMAICHELLA, *supra* note 228, at 154-56; Letter from 'Abd-Allah Tuwwar, *kaymakam* of Borku, to Colonel Hirtzman (Jan. 9, 1918 (30 Muharram 1331)) (the French erroneously calculated the date as December 25, 1912), in CIAMMAICHELLA, *supra* note 228, at 163-65; Letter from Muhammad 'Idris al-Sanusi to Stephen Pichon, French Minister of Colonies (Apr. 18, 1913 (11 Jumatha al-'ula 1331)), in CIAMMAICHELLA, *supra* note 228, at 170-71; Letter from 'Abd-Allah Tuwwar, *kaymakam* of Borku, to French Commandant of Ouadai (April 20, 1913) (the date is approximate), in CIAMMAICHELLA, *supra* note 228, at 174-76.

influence agreement with Great Britain, and argued that Bonnel de Mézières had acted outside the scope of his delegated powers.²⁹⁵ Nevertheless, Bonnel de Mézières's letters gave rise to later claims that France had tacitly consented to consider this area "as a sort of contested zone that could one day be considered the object of negotiations."²⁹⁶

b. *The Arrival of Captain Rifki at Ain Galakka*

In 1911, the Sanusi, through Muhammad Sunni, also requested a Turkish presence.²⁹⁷ Ahmad al-Sharif, the Sanusi Grand Master, opposed this decision, but Muhammad Sunni defended it, saying that "Turkish supremacy would be an evil, but we have to accept it, since it will spare us from a greater evil: French domination."²⁹⁸ Reinforcements under the Turkish Captain Ahmed Rifki arrived at Ain Galakka in 1911, bringing the total number of Turkish troops in the area to at least sixty.²⁹⁹ The Turks also extended their hold on Tibesti, establishing a post at Yoo, on the south side of the massif, in 1911.³⁰⁰

However, the Sanusi commander of the *zawiyah* at Ain Galakka, °Abd-Allah Tuwwar, gave the Turks a decidedly cool reception. °Abd-Allah Tuwwar had led the massacre of a French platoon at Ouaschenkellé in 1909 and thus was certainly no friend of the French, but he also was unwilling to cede control over Borku to the Ottomans. Telling Rifki that his efforts would be better spent in reconquering Kanem from France,³⁰¹ the Sanusi leader refused to permit Rifki to station his forces at Ain Galakka, forcing him to set up his

295. See, e.g., Letter from Albert Defrance, French Minister Plenipotentiary, to Muhammad Idris al-Sanusi (June 24, 1913), in CIAMMAICHELLA, *supra* note 228, at 173-74 ("this boundary had been set for several years by an agreement known to all between the great governments and of which you undoubtedly were aware").

296. Ferrandi, *La vérité*, *supra* note 24, at 395.

297. Explanations for this action vary. Some have asserted that the Sanusi sought to quell Toubou unrest arising from Sanusi taxes and *corvées* and to prevent these disturbances from opening the door to French intervention. See *id.* at 392; see also LANGE, *supra* note 11, at 44. According to a contemporary French officer with access to captured Sanusi records, the inadequacy of local resources led the Sanusi to raid the populations under French control to the South. *Les pauvres turcs*, *supra* note 283, at 502. Others have suggested that Turkey and the Sanusi had reached an understanding to resist French and Italian colonial expansion jointly. See PICHON, *supra* note 161, at 70.

298. Ferrandi, *La vérité*, *supra* note 24, at 392. According to a French officer who had spoken with Sanusi leaders and Toubou chiefs, Muhammad Sunni hoped to use the Turks to keep order in the regions and deliberately exaggerated the French threat in order to persuade Ahmad al-Sharif to consent to a Turkish presence. *Les pauvres turcs*, *supra* note 283, at 502. French civilian officials still had no intention of occupying Borku at this time. See *infra* notes 319-320 and accompanying text.

299. See LANGE, *supra* note 11, at 37-38, 45-47; *Les aspirations*, *supra* note 161, at 326; Wright, *Historical Connections*, *supra* note 25, at 94. Other contemporary sources put the number of Turkish troops at 80. Auguste Terrier, *La pacification du territoire militaire du Tchad*, 22 B.C.A.F. 77, 82-83 (1912).

300. CLINE, *supra* note 18, at 21.

301. Terrier, *supra* note 299, at 82.

camp at nearby Yen.³⁰² Whether 'Abd-Allah Tuwwar also refused to raise the Turkish flag at Ain Galakka is less clear.³⁰³

Understandably irked, Rifki wrote to the French commander Colonna de Leca, stating that he had come at the request of the Sanusi who feared the destruction of their *zawiyahs*. Rifki expressed hopes of having good relations with the French and of cooperating with them to police the area.³⁰⁴ In a personal exchange with Colonna de Leca, Rifki also reportedly confided his humiliation at being duped and used by the Sanusi. When recalled by his government in 1912, he wrote to Colonna de Leca that he was "glad to be free of the Sanusi trap."³⁰⁵

c. The French Reaction to Rifki

Rifki's arrival placed France in a difficult situation. Although Rifki was asserting Turkish sovereignty over areas France claimed under certain treaties,³⁰⁶ France still preferred the Turks to the Sanusi. However, the Turkish presence prevented France from acting in force against the Sanusi, without guaranteeing an end to the Sanusi raids against French troops. But France had pledged to remain neutral in the conflict between Turkey and Italy, which erupted in October 1911, and it could neither aid nor expel Rifki without violating that pledge.³⁰⁷

Given Rifki's evident annoyance at the Sanusi attitude and his desire to cooperate with the French, the French military commandant, Largeau, wrote to Rifki in January 1912. Largeau stated first that France's neutrality prevented him from allowing Rifki to obtain supplies and provisions from "French territory." He then reserved French rights over Tibesti and Borku and observed that their respective governments should negotiate to resolve this question.³⁰⁸ Largeau cautioned that "[w]e do not recognize the Ottoman occupation of

302. Ferrandi, *La vérité*, *supra* note 24, at 394; Mangeot, *supra* note 211, at 328-29; *Les pauvres turcs*, *supra* note 283, at 502.

303. See, e.g., 1 CARBOU, *supra* note 34, at 156 ("we learned with amazement that the Turkish flag had been raised at Ain Galakka"); ROSSI, STORIA, *supra* note 161, at 347 (Rifki "planted the Ottoman flag at Ain Galakka"); but see Ferrandi, *La vérité*, *supra* note 24, at 394 ("Abd-Allah Tuwwar told Rifki "that if he insisted on planting the Turkish flag on a fortress, he had only to raise it over a French post").

304. Ferrandi, *La vérité*, *supra* note 24, at 394; Mangeot, *supra* note 211, at 329; *Les pauvres turcs*, *supra* note 283, at 503.

305. *Les pauvres turcs*, *supra* note 283, at 503.

306. Indeed, the timing of Rifki's arrival was awkward: Rifki arrived in August, and the Franco-Turkish delimitation commission was supposed to commence its work in the autumn. This may be coincidence, or instead it may suggest a final attempt by Turkey to bolster its position before the commission began meeting.

307. See FERRANDI, *supra* note 18, at 32; Mangeot, *supra* note 211, at 329; see also *Les aspirations africaines de l'Italie*, 38 B.C.A.F. 496, 501 (1928) [hereinafter *Les aspirations africaines*]; see generally PICHON, *supra* note 161, at 108.

308. Letter from Colonel Victor-Emmanuel Largeau to Captain Ahmad Rifki (Jan. 12, 1912), in *Les aspirations africaines*, *supra* note 307, at 501; see also Ferrandi, *La vérité*, *supra* note 24, at 394-95.

Borku," but proceeded to reassure Rifki that, "linked with the Porte by a secular friendship, we will not profit from its present difficulties to attack its lodge at Galakka. We will therefore respect the present situation" until the end of the war.³⁰⁹ Hoping to enlist Rifki in a project to end the raids emanating from Tibesti and Borku, Largeau declared that the Ottoman government, "by planting its flag in Borku," had "taken responsibility" for the "thefts and pillaging" committed by the Borku population against peoples under French protection.³¹⁰ Italy would later argue that France's tolerance of Rifki's presence and its attempt to hold him responsible for the actions of the population constituted a recognition of Turkish sovereignty over the area.³¹¹

Rifki responded to Largeau that Turkey had never assented to the Anglo-French accord of 1899, that Turkey had possessed rights in Borku, Ennedi, and Tibesti for decades, and that France and Britain could not modify these rights.³¹² Through this correspondence Largeau and Rifki reached a *modus vivendi* for the maintenance of local order and security.

The French government protested more forcefully. Alarmed at Rifki's actions, it stated that it would refuse to recognize them as conferring any valid title on Turkey.³¹³ The Ministry of Colonies, claiming that the contiguity of Tibesti and Borku with Kanem placed those regions in a special situation, announced that France intended to enforce its rights under the 1899 treaty.³¹⁴

French colonialists later denied vigorously that Rifki's presence established an effective Turkish occupation. They noted first that Rifki himself explained that he had come at the request of the Sanusi, not on orders from Tripoli. (However, the Sanusi did make their request to Sami Bey, the governor of Fazzan.) Moreover, the French argued, in addition to receiving shoddy treatment from 'Abd-Allah Tuwwar, Rifki was totally dependent on the Sanusi for provisions. Nor did Rifki ever perform any administrative act in Borku (apart from helping the French to maintain order), such as collecting taxes or signing passes; instead, 'Abd-Allah Tuwwar continued to exercise these responsibilities. Finally, the French noted, the Turks never interfered with French *méharistes* who pastured their camels in southern Borku.³¹⁵

309. Telegram from Colonel Victor-Emmanuel Largeau to French Colonial Administration at Brazzaville (May 27, 1912), in CIAMMAICHELLA, *supra* note 228, at 151.

310. Letter from Colonel Victor-Emmanuel Largeau to Captain Ahmad Rifki (Jan. 12, 1912), in *Les aspirations africaines*, *supra* note 307, at 501.

311. See ROSSI, STORIA, *supra* note 161, at 347 n.124 (arguing that letter "constitutes a recognition of Turkish sovereignty in Borku"); Rossi, *Penetrazione*, *supra* note 161, at 166 n.6; *Les aspirations*, *supra* note 161, at 325-26 (discussing Rossi's arguments appearing in *Oriente moderno* of April 1929).

312. CIAMMAICHELLA, *supra* note 228, at 120; PICHON, *supra* note 161, at 70.

313. 1 CARBOU, *supra* note 34, at 156; PICHON, *supra* note 161, at 71-72, 231-32.

314. See L'ANNE, *supra* note 11, at 62. For a discussion of the 1899 treaty, see *infra* notes 791-823 and accompanying text.

315. See generally *Les aspirations italiennes vers le Lac Tchad*, 38 B.C.A.F. 417, 417 (1928).

In any event, Captain Rifki's stay in Borku proved to be brief. In October 1911, war broke out between Turkey and Italy, and the Ottomans evacuated their forces from Tibesti and Borku in the spring of the following year.³¹⁶ Rifki left behind a few soldiers and a Turkish lieutenant (*mülazım*).³¹⁷ Under the terms of the Treaty of Lausanne ending the war, Turkey withdrew its garrisons from Tripolitania and Cyrenaica, implying a withdrawal from Borku and Tibesti as well.³¹⁸ Thus, the Turkish presence in the region lasted less than three years and was sizeable only for a matter of months.

4. *The French Conquest After the Turkish Evacuation, 1913-1916*

As late as April 1911, Minister of Colonies Adolphe Messimy had disclaimed any French intention to occupy Tibesti and Borku, stating that such action "would be crazy because [these regions] are occupied by plundering and warlike tribes."³¹⁹ Asked in the following November whether France would occupy Tibesti and Borku in order to assure the security of Ouadai, Messimy's successor, Albert Lebrun, replied that France would have to be "prudent."³²⁰ The cautious French attitude changed radically after Rifki's arrival and his subsequent departure for the coast.

Even after the bulk of the Ottoman forces withdrew to fight against the Italian invasion, Turkey continued to claim territory in northern Chad. In October of 1912, shortly before the signing of the Treaty of Lausanne, the Ottoman *mülazım* at Ain Galakka journeyed to Ennedi, reportedly at the bidding of 'Abd-Allah Tuwwar,³²¹ and proclaimed a Turkish protectorate over the region. Once there he exacted tolls from passing caravans.³²² The French Commandant Jannot, stationed in Ouadai, protested these measures in early November and reaffirmed France's rights in Ennedi.³²³ 'Abd-Allah Tuwwar responded that the Turkish soldiers would be withdrawn,³²⁴ but the

316. See LANE, *supra* note 11, at 40.

317. *Id.* at 52; Ferrandi, *La vérité*, *supra* note 24, at 395.

318. Treaty of Peace, Oct. 18, 1912, Italy-Ottoman Empire, art. 2, 22 Trattati e Convenzioni (Italy) 243, 244 [hereinafter Treaty of Lausanne]; see also LANE, *supra* note 11, at 53. Turkey reportedly notified France at the time that it was abandoning the entire hinterland of Tripolitania and ordering its troops to return to Istanbul. Auguste Terrier, *Au territoire du Tchad: Avant et après la prise d'Ain-Galakka*, 25 B.C.A.F. 6, 6 (1914) [hereinafter Terrier, *Au territoire*].

319. LANE, *supra* note 11, at 62.

320. *Id.* at 63.

321. See Ferrandi, *La vérité*, *supra* note 24, at 395.

322. *Id.* at 395-96. Contemporary French observers stated that the lieutenant was in a desperate condition in the desert and that the exaction "was less an act of sovereignty than an unavoidable concession to the necessity of not starving to death." *Id.*

323. Letter from Commandant Jannot to 'Abd-Allah Tuwwar, *kaymakam* of Borku (Nov. 4, 1911), in CIAMMAICHELLA, *supra* note 228, at 160-61.

324. Letter from 'Abd-Allah Tuwwar, *kaymakam* of Borku, to Commandant Jannot (Dec. 18, 1912 (8 Muharram 1331)) (French erroneously calculated date as December 13, 1912), in CIAMMAICHELLA, *supra* note 228, at 162-63.

Turkish officer stalled and offered to take the matter up with Istanbul.³²⁵ French forces occupied Oum Chalouba as a preventive measure in early 1913.³²⁶

In March 1913 the Turkish lieutenant appeared at Baki, southwest of Fada, where he informed the French that he intended to construct a post. Only when some ninety French riflemen arrived later that month did the Turks evacuate the town, leaving Ennedi forever.³²⁷ The lieutenant told the French that he was "happy to leave" and had been "the slave of the *'ikhwan*," but the French officer who spoke to him did not believe him.³²⁸ It is possible that these incidents represented a deliberate policy by Istanbul; however, it is also possible that these soldiers and officials had not been informed of Turkey's abandonment of the region.³²⁹

France quickly moved to occupy the rest of B.E.T. In June, Largeau, the three-time French military commander in Chad, returned yet again with orders to occupy Borku and Ennedi.³³⁰ In late November French forces assaulted and captured Ain Galakka. They found no trace of a Turkish presence.³³¹ In December they took Faya, which the Sanusi had abandoned, chased Muhammad Sunni from Gouro, the former Sanusi headquarters, and finally captured Ounianga Kebir to the southeast.³³² By February Largeau discovered that the Sanusi had entirely abandoned Borku and Ennedi, and he installed military posts at Faya, Ain Galakka, Fada, Gouro, and Ounianga Kebir.³³³

In driving the Sanusi from Borku and Ennedi, Largeau also had to confront the Anakazza. Some of this Toubou group, under the leadership of Alla Tchi, sided with the Sanusi, while another group, led by a chief named Djime, joined the French.³³⁴ In January 1912 Alla Tchi still remained at large in Borku and loyal to the Sanusi, creating a dilemma for the French forces in Ennedi as thousands of Anakazza, unwilling to submit to the French, brought their camels

325. See CIAMMAICHELLA, *supra* note 228, at 165-66; LANE, *supra* note 11, at 53.

326. LANE, *supra* note 11, at 53 n.94.

327. *Id.* at 54; Ferrandi, *La vérité*, *supra* note 24, at 396; Mangeot, *supra* note 211, at 330; Terrier, *Au territoire*, *supra* note 318, at 6. See generally *Les pauvres turcs*, *supra* note 283, at 503. The French claimed that the Sanusi had the Turkish detachment murdered in the desert on its way to Libya. *Id.*

328. See CIAMMAICHELLA, *supra* note 228, at 168-69.

329. When the French protested these incidents at Istanbul, the Turkish government replied that it was unaware of any penetration by its forces in Ennedi and promised that the matter would be quickly resolved. The Turkish governor of Tripoli gave no response to inquiries from Istanbul. Again, the failure to communicate may have been genuine. Lanne suggests that it was a deliberate part of a dilatory campaign to avoid settling the question of the Tunisian boundary. See LANE, *supra* note 11, at 58-59.

330. See Ferrandi, *La vérité*, *supra* note 24, at 396.

331. LANE, *supra* note 11, at 54. The French did find, however, that the Sanusi had told the local population that Europeans were "ogres" and "satyrs" who were capable of killing with a glance. Ferrandi, *La vérité*, *supra* note 24, at 84.

332. *La campagne du Borkou*, 24 B.C.A.F. 50, 50 (1914); see also LANE, *supra* note 11, at 66; Mangeot, *supra* note 211, at 330.

333. LANE, *supra* note 11, at 67.

334. CHAPPELLE, NOMADES NOIRS, *supra* note 15, at 133; FERRANDI, *supra* note 18, at 111.

to Ennedi for pasturing according to their custom. The Anakazza eventually attacked and murdered an 'Awlad Sulaiman chief on his way to Faya to submit to the French, provoking a vigorous French response.³³⁵ By the end of 1913, Alla Tchi's brother had submitted to Largeau at Faya,³³⁶ but only in January 1914, after making some "voluntary restitution" of recently stolen animals, did Alla Tchi finally surrender at Fada in Ennedi.³³⁷ As for Djime, he later turned against the French and massacred a detachment.³³⁸

Contemporaneous with the conquest of Borku and Ennedi, a French column from Bilma, in present-day Niger, was operating in Tibesti. The Gounda clan had submitted in 1912.³³⁹ Zouar, site of a former Turkish fort, fell in December 1913. Bardaï, to the north, fell six months later, causing *Derde* Chai to flee to Kufrah for refuge. By the end of July 1914 the French had linked Tibesti and Borku.³⁴⁰ A cousin of Chai named Guetti, whom the Turks had appointed as chief of western Tibesti, surrendered after Chai fled, and the French appointed him *Derde* and his son Alifa chief of Bardaï.³⁴¹

5. Summary

The French conquered northern Chad in two stages, interrupted by a brief Turkish presence in the northernmost parts. The first stage, between the death of Rabih in 1901 and the capture of Abéché in 1909, brought France control of Kanem and Ouadai. The taking of Abéché roughly coincided with the arrival of Ottoman troops in Tibesti and Borku, and, although France protested the Turkish actions, its troops coexisted peacefully with the Turkish forces for a brief period. With the departure of the bulk of these troops northward in the spring of 1912, and Turkey's renunciation of sovereignty over Tibesti and Borku later that year, France began the second stage of its occupation of the area, completing its conquest in the summer of 1914.

335. FERRANDI, *supra* note 18, at 217.

336. *Id.* at 201. Alifa Guettimi, the son of the *Derde*, also arrived at Faya at the same time, hoping (according to Ferrandi) to avoid submitting to the French forces who were then invading the Tibesti massif from the West. The French, well aware of these facts, recognized "usual Gorane tactics" and refused to fall into this "trap." *Id.* at 201-02.

337. *See id.* at 229-31.

338. CHAPELLE, NOMADES NOIRS, *supra* note 15, at 133.

339. CLINE, *supra* note 18, at 21, 43.

340. L'ANNE, *supra* note 11, at 67; *see also Notre action au Tibesti*, 24 B.C.A.F. 106, 106-07 (1914); *L'Occupation du Tibesti*, 24 B.C.A.F. 349, 349-50 (1914).

341. CLINE, *supra* note 18, at 21, 43.

C. France's Withdrawal From Tibesti, Subsequent Reoccupation, and Friction With Italy, 1916-1940

While French forces were subduing Tibesti and Borku, Italian forces were taking control of the Tripolitanian hinterland. By the spring of 1914, Italy had conquered Fazzan.³⁴² However, the Italians never penetrated as far south as the Turks had before them, and they did not remain long in the region. In August a revolt led by the Sanusi and instigated by the Turks broke out. In 1915 the Italian forces in Fazzan abandoned their positions and retreated to the Libyan coast, leaving the Sanusi in control over the interior.³⁴³

1. The Withdrawal From Tibesti

The Sanusi, along with *Derde Chai* (who was in exile with them at Kufrah), continued to foment disturbances and raids from Fazzan against the French. Although Tibesti and Borku were not targets, the French, perhaps prompted by local uprisings, abandoned Bardai and Zouar.³⁴⁴ France also withdrew from Ounianga Kebir and transferred the post to Yao. The French withdrawal left the area "in a highly disturbed condition," and the French were obliged to launch occasional punitive expeditions, including one in 1919 from Faya, "but even by 1930 the pacification of the BET . . . was scarcely completed, nor could anything resembling orderly administration be established for some time."³⁴⁵ The competing claims of Chai and Guetti to be *Derde* contributed to the unrest. However, this source of tension ended when Chai submitted to the French in 1920 and Guetti fled.³⁴⁶

The submission of Chai brought peace between the French and the Teda. The French, who sharply restricted Chai's powers and watched him closely, reported that Chai was cooperating with them.³⁴⁷ Nevertheless, internal disorder continued in Tibesti. The chief of the Gounda had fled to Fazzan, the Abo

342. LANE, *supra* note 11, at 78.

343. *Id.* at 67, 98; see also JOHN WRIGHT, *LIBYA: A MODERN HISTORY* 29-30 (1982) [hereinafter WRIGHT, LIBYA].

344. See *L'occupation du Tibesti*, 40 B.C.A.F. 95, 95-96 (1930) [hereinafter *L'occupation*]; *La mission du lieutenant-colonel Burthe d'Annelet en Afrique centrale*, 40 B.C.A.F. 163, 166 (1930) [hereinafter *La mission*]; see also Comarin, *supra* note 11, at 6; Fisher & Fisher, *supra* note 240, at 429. Italy did not miss the opportunity to point out that French troops passed through the region only infrequently and sporadically. See *Les frontières de la Libye*, 39 B.C.A.F. 111, 112 (1929).

345. Fisher & Fisher, *supra* note 240, at 429-30.

346. CLINE, *supra* note 18, at 21, 43. Some observers have detected a pattern in Chai's relations with external powers. Chai would first lead Toubou resistance, then submit at a moment that was opportune for preserving his internal authority. Thus, shortly after leading the massacre of the Fazzanese expedition, Chai journeyed to Marzuq and submitted voluntarily to the Turks, receiving an appointment as *kaymakam* and a monthly stipend. Similarly, Chai resisted the French between 1914 and 1920 but submitted once it became clear that France could support rival chiefs against him. See LE COEUR, LE RITE, *supra* note 80, at 68.

347. CLINE, *supra* note 18, at 43.

district in the west had not yet submitted, and the Arna were still raiding.³⁴⁸ The situation became so chaotic that several Toubou chiefs, seeking to preserve what little authority they possessed, pressed the French to reoccupy the territory in the 1920s.³⁴⁹

Despite the French absence, Sanusi elements never re-entered Tibesti, and French forces from Bilma later reoccupied Zouar.³⁵⁰ Still, it was not until 1929, prompted by the Italian advance to Kufrah, that French forces reoccupied Tibesti and remained there continuously until 1964.³⁵¹ France established several posts along the north edge of the massif to prevent Italian entry into the area.³⁵²

2. The Italian Territorial Demands and France's Reoccupation of Tibesti

After Italy entered World War I on the side of the Entente, various Italian groups began to clamor for a readjustment of boundaries in Africa, claiming that Article 13 of the Treaty of London entitled Italy to certain territorial concessions.³⁵³ For instance, in April 1918 the *Rivista Coloniale* published a report claiming Borku and Tibesti on the basis of historic rights inherited from Turkey.³⁵⁴ The Italian demands became more strident as the 1919 peace conference approached. Early in January, for instance, the Società Africana d'Italia called for a border based on the claims Turkey had made in response to the Anglo-French declaration of 1890.³⁵⁵ And the *Bulletin du Comité de l'Afrique française* recognized the need for a "light rectification of the frontier of Tibesti and Borku."³⁵⁶

Overall, however, the French remained reluctant to make concessions in this area. After negotiating over the Italian colonial demands at Versailles, French Minister of Foreign Affairs Stephen Pichon and Ambassador Bonin of Italy reached an agreement memorialized in an exchange of letters dated September 12, 1919 (Pichon-Bonin Accord). The Accord concerned only adjustments to the western frontier of Libya, as the parties were unable to

348. See *id.* at 44.

349. Fisher & Fisher, *supra* note 240, at 430.

350. L'ANNE, *supra* note 11, at 67.

351. *L'occupation*, *supra* note 344, at 95-96; see also BECK & HUARD, *supra* note 39, at 270; L'ANNE, *supra* note 11, at 68; *La mission*, *supra* note 344, at 166.

352. CLINE, *supra* note 18, at 22; L'ANNE, *supra* note 11, at 117, 123, 175.

353. The treaty obligated France and Britain, if they increased their colonial holdings in Africa at the expense of Germany, to recognize Italy's right to "certain equitable compensations, notably in the settlement in its favor of questions concerning the boundaries of the Italian colonies of Eritrea, Somalia and Libya with the neighboring colonies of France and Great Britain." Treaty of London, Apr. 26, 1915, art. 13, 23 *Trattati e Convenzione* (Italy) 284, 289; see also L'ANNE, *supra* note 11, at 83-85.

354. L'ANNE, *supra* note 11, at 86.

355. *Id.* at 87. For a description of the Turkish claim, see *supra* note 161 and accompanying text.

356. Camille Fidel, *Le problème colonial italien et l'alliance italo-française*, 29 B.C.A.F. 30, 30-45 (1919); see also L'ANNE, *supra* note 11, at 89.

reach any agreement on the southern boundary.³⁵⁷ France published a "yellow book" in January 1920 that sought to demonstrate that Italy had accepted the boundary France claimed by agreeing in 1902 that France would restrict herself to the territory within the lines drawn on the map annexed to the 1899 declaration.³⁵⁸ Italy responded that the 1902 agreement concerned the boundary only to the west of Tummo, and that the question of the boundary east of Tummo remained open.³⁵⁹

Through the 1920s French resistance to further Italian demands hardened, even as the Italian press became more strident. Late in 1921, for instance, the Italian government protested a convention concluded between France and Great Britain in 1919,³⁶⁰ claiming that the agreement altered, to Italy's disadvantage, the line envisioned in 1899.³⁶¹ At the heart of the Italian claim was language in the 1899 Declaration stipulating that the limit of the French zone of influence was to run "south-east" from the Tropic of Cancer at 16° east longitude. Italy argued that this language indicated a line running truly south-east; France countered that the preparatory documents to this agreement indicated an intent to include Ennedi in the French zone, and that the line envisaged actually ran more to the east-southeast. The parties continued to debate the matter in another series of diplomatic notes in 1923 and 1924. However, when France and Britain confirmed the French version of the boundary in 1924,³⁶² Italy did not protest.³⁶³

A second diplomatic campaign followed in late 1928, when France offered to cede to Italy a triangle of land in southeastern Algeria and northern Niger.

357. See LANGE, *supra* note 11, at 93-94; see also PICHON, *supra* note 161, at 226; E. ROUARD DE CARD, *LE DIFFÉREND FRANCO-ITALIEN CONCERNANT LA FRONTIÈRE MÉRIDIONALE DE LA LIBYE* 29-30 (1929) [hereinafter ROUARD DE CARD, *LE DIFFÉREND*]. In September 1919 Tommaso Tittoni reported to the Italian Parliament that the question of Tibesti and Borku remained open and would be the subject of further negotiations. *Id.*; *Les frontières méridionales de la Libye*, 38 B.C.A.F. 42, 43 (1928) [hereinafter *Les frontières méridionales*]. In July 1923 Mussolini (who had become President of Italy the previous October) revived these claims, informing France that the Pichon-Bonin agreement was not a definitive solution for Italy and that Italy would continue to press for the compensation it deserved under the Treaty of London. ROBERTO CANTALUPO, *L'ITALIA MUSULMANA* 260 (1928); LANGE, *supra* note 11, at 97; PICHON, *supra* note 161, at 220-21. Italy further argued that by agreeing to additional negotiations in 1927, France implicitly admitted that the 1919 accord did not extinguish Italy's claims under Article 13 of the Treaty of London. LANGE, *supra* note 11, at 106.

358. FRANCE, MINISTÈRE DES AFFAIRES ÉTRANGÈRES, DOCUMENTS DIPLOMATIQUES: LES ACCORDS FRANCO-ITALIENS DE 1900-1902 (1920); see also LANGE, *supra* note 11, at 95. For a discussion of the Anglo-French agreement and Italy's agreement to accept the boundary described in it, see *infra* notes 791-815 and accompanying text.

359. CANTALUPO, *supra* note 357, at 258; see also PICHON, *supra* note 161, at 181, 189-97; ROUARD DE CARD, *LE DIFFÉREND*, *supra* note 357, at 41-42. Italy also claimed that the Pichon-Bonin Accord covered territorial "debts" arising from Turkey's hinterland and that Italy could therefore seek additional concessions under the Treaty of London. See PICHON, *supra* note 161, at 226-27.

360. See LANGE, *supra* note 11, at 25 n.37; PICHON, *supra* note 161, at 190. France rejected these claims in diplomatic notes dated February 7 and March 27, 1923. *Id.*

361. See LANGE, *supra* note 11, at 24-25.

362. See *infra* notes 826-827 and accompanying text.

363. See generally LANGE, *supra* note 11, at 96-97.

Mussolini's counterproposal, which would have given Italy all of Tibesti, almost all of Borku, and a large part of Ennedi, did not engender French enthusiasm.³⁶⁴

Italy's goal in making these demands was not merely to gain territory. After all, the land in dispute was barren, harsh, and not known to have any economic resources. Rather, Italy sought control of the trans-Saharan trade routes. These routes linked Fazzan with Lake Chad and the surrounding area and Kufrah with Ouadai.³⁶⁵ French colonialists, unwilling to cede any territory, painted a different picture, claiming that Italy hungered for territorial expansion and that French concessions would only whet the Italian appetite.³⁶⁶

However, Italy had not yet reoccupied Fazzan. This reconquest commenced only in 1929 (prompting France to reoccupy Tibesti). In 1930 the Italian campaign, like the Turkish reconquest in the 1840s, spurred a migration of 'Awlad Sulaiman to northern Chad.³⁶⁷ By February of that year Italian forces had reached the boundary set in 1899. The following January Italy reoccupied Kufrah.³⁶⁸

The French, for their part, not only reoccupied Tibesti but also set up a series of posts and mobile detachments along the frontier to prevent Italian encroachment, including installations at Agoza in the east, Aouzou in the west, and Ouri between them.³⁶⁹ Despite these measures, the Italian General Balbo claimed to have performed an aerial reconnaissance mission over Tibesti in late June 1931 and to have landed and stayed overnight in French territory. Balbo reported to Rome that the region had been "practically abandoned by the French." France vigorously denied these allegations, and one scholar has commented that the coordinates given by Balbo put his landing and campsites within Italian, not French, territory.³⁷⁰

In 1934 Italy gained British recognition that the Sarrah Triangle, a chunk of land directly north of Ennedi and Borku, belonged to Italy. France claimed that the exchange of notes memorializing this accord constituted implicit Italian recognition of the boundary claimed by France, ending at 19°30' north latitude on the twenty-fourth parallel (the boundary of the French possessions with

364. *Id.* at 108; PICHON, *supra* note 161, at 237.

365. LANNE, *supra* note 11, at 116. Italy also hoped to build a trans-Saharan railway linking Lake Chad to Tripoli. Comarin, *supra* note 11, at 7.

366. See Comité de l'Afrique française, *Relations franco-italiennes*, 42 B.C.A.F. 501, 501-03 (1932); see also LANNE, *supra* note 11, at 120.

367. LANNE, *supra* note 11, at 99; Lemarchand, *A propos du Tchad*, *supra* note 1, at 22; Martine Muller, *Frontiers: An Imported Concept*, in LIBYA SINCE INDEPENDENCE: ECONOMIC AND POLITICAL DEVELOPMENT 166 (J.A. Allan ed., 1982).

368. CLINE, *supra* note 18, at 22; LANNE, *supra* note 11, at 99.

369. LANNE, *supra* note 11, at 117, 123, 175.

370. See *id.* at 118.

Sudan to the east).³⁷¹ The French arguments were not entirely persuasive because the 1934 agreements stated only that the southern boundary of the Sarrah Triangle was "the frontier of French possessions," without specifying the location of that frontier.³⁷²

3. *The Mussolini-Laval Accords*

In 1934-1935, seeking to prevent an Italo-German alliance, France finally decided to appease Italy in Africa. The resulting set of agreements, called the Mussolini-Laval Accords, gave Italy a free hand in Ethiopia and included a treaty (the Treaty of Rome) that transferred to Italy the strip of land that would later be called the Aouzou Strip. The intended cession of that land in 1935, although it never became effective, constitutes a major foundation for the present Libyan claims.³⁷³

The French government defended these accords before the Chamber of Deputies. Three ministers, including Laval, the Prime Minister, explained that the boundary set forth in the agreement was a strategically sound one, keeping to the line of mountain crests in Tibesti.³⁷⁴ In fact, the line fixed in the accords was supposedly suggested by a French officer stationed in B.E.T. to assure the highest degree of security in the region.³⁷⁵ The commission report noted that the accords left Italy the northern parts of Tibesti, where the population had relations with Kufrah and Fazzan, while reserving to France the tribes who traveled south in their nomadic migrations.³⁷⁶

After 1936, maps of French Equatorial Africa and French West Africa showed the boundaries of Chad at the lines fixed in 1935.³⁷⁷ Nevertheless, the souring of Franco-Italian relations following Mussolini's invasion of Ethiopia in 1935 prevented France from ever ratifying the agreements.³⁷⁸ Italy never occupied the ceded territories before it denounced the agreements in December 1938, and French troops never left the posts France established

371. See *id.* at 124. For a discussion of the border with Sudan and its impact on the French, and later the Chadian, claims to the Aouzou Strip, see *infra* notes 825-827.

372. Exchange of Notes, July 20, 1934, U.K.-Egypt-Italy, art. 2, 155 L.N.T.S. 45 [hereinafter 1934 Exchange of Notes]; see also *infra* notes 833-836 and accompanying text.

373. For a more thorough discussion of these agreements, see *infra* notes 898-919 and accompanying text.

374. L'ANNE, *supra* note 11, at 139. According to L'ANNE, the generals and other officers who opposed the 1935 agreements exaggerated the military value of the territory ceded, since the actual line of the crests was further south. *Id.* at 152.

375. *Id.* at 151.

376. *Id.* at 140. The commission, playing on the French desire to keep Italy out of Hitler's orbit, did not fail to remind the Chamber of the disturbing recent events in Germany, either. *Id.* at 141.

377. *Id.* at 139.

378. See *infra* notes 914-921 and accompanying text.

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there.³⁷⁹ These posts included Moya, ten kilometers north of Aouzou, and Rocher Noir (Black Rock), forty-five kilometers south of the boundary in the east, on the road from Ounianga Kebir to Kufrah. Italian troops, visiting these posts periodically between 1935 and 1938, always found French troops there. French forces encountered a group of Libyan workers that Italians had brought to Rocher Noir in March 1939, and escorted them back to Libya.³⁸⁰ In the summer of 1939, as relations between France and Italy deteriorated, France prepared to defend against Italian advances into Chad, reinforcing its posts in the zone that was to have been ceded.³⁸¹

4. Summary

The interaction of France and Italy between 1915 and 1939 sheds interesting light on the problem of the Aouzou Strip. First, the Sanusi did not welcome either colonial power in the area and prevented both of them from establishing a continuous presence there before 1929. Sanusi-led revolts drove Italian troops from Fazzan in 1915, and the French initially abandoned Tibesti in 1916 in the face of Sanusi-instigated raids. Despite the submission of the *Derde* in 1920, France did not reoccupy the region until 1929. Italian troops returned to Fazzan from the Libyan coast at about the same time.

Second, France resisted Italian territorial demands, and its one capitulation in 1935 was never consummated. As the Italians arrived from the north, France took steps to prevent them from encroaching on French lands. Although the abortive 1935 agreement would have ceded the Aouzou Strip to Italy, French forces did not abandon the area, and Italian forces never sought to occupy it. Instead, by the outbreak of World War II France had strengthened its presence in the frontier region.

D. From World War II to Libyan Independence

On June 10, 1940, Italy declared war on France. Between this date and the armistice two weeks later no fighting took place in the Chadian region. The armistice required France to reduce the number of troops in northern Chad and to evacuate the border zone.³⁸² However, in August Governor Félix Éboué decided to bring Chad into the war on the side of Free France. (Niger and all of French West Africa stayed aligned with the Vichy government.) General

379. L'ANNE, *supra* note 11, at 166; Habib Boularès & Hamza Kaïdi, *L'autre affaire du Sahara*, JEUNE AFRIQUE, Oct. 22, 1976, at 30.

380. L'ANNE, *supra* note 11, at 176; Comarin, *supra* note 11, at 7.

381. L'ANNE, *supra* note 11, at 175; Comarin, *supra* note 11, at 7-8.

382. Armistice, June 24, 1940, Italy-Fr., arts. III, IV, V, 56 Trattati e Convenzioni (Italy) 197, 197-98; see also L'ANNE, *supra* note 11, at 177.

Leclerc mobilized and led a Free French column that reoccupied the front, passing on to Fazzan. By early 1943 Leclerc had arrived in Tripoli. In September, he turned Fazzan over to Algerian colonial authorities, who governed the province through Fazzanese intermediaries until Libya became independent.³⁸³

By the terms of its peace treaty with the Allies, signed in February 1947, Italy renounced all claim and title to its former possessions in Africa.³⁸⁴ In Article 23 and Annex 11 of the treaty, the four Great Powers pledged to decide the fate of Italy's former African possessions within one year, or, failing that, to submit the matter to the United Nations General Assembly.³⁸⁵ The Allies also agreed to adjust the boundaries of these territories, taking into consideration the concerns of the inhabitants and the views of other interested governments.³⁸⁶ In the meantime, the possessions would remain under their present administration, with France governing Fazzan and Great Britain administering Tripoli and Cyrenaica.³⁸⁷ Although only the fate of the territories was to be submitted to the General Assembly, the ambiguity of Article 23 and Annex 11 permitted the General Assembly to consider the question of boundaries as well.³⁸⁸

In May 1949 a plan negotiated by Great Britain and Italy, which would have given Fazzan to France for the six years before Libyan independence, failed by one vote to gain the two-thirds majority necessary for General Assembly approval.³⁸⁹ Six months later the General Assembly passed Resolution No. 289(IV), recommending the creation of an independent and sovereign Libyan state by the beginning of 1952 and asking the special commission handling the Libyan question "to study the procedure to be adopted to delimit the boundaries . . . in so far as they are not already fixed by international agreement"³⁹⁰ This resolution effectively ended French hopes for a looser federation that would have allowed France to preserve some influence in Fazzan.³⁹¹ At the end of 1950 the General Assembly adopted Resolution

383. See LANE, *supra* note 11, at 178-79; WRIGHT, LIBYA, *supra* note 343, at 49; see also THOMPSON & ADLOFF, *supra* note 45, at 12; Muller, *supra* note 367, at 173. France, hoping to link Algeria more closely with its other African possessions, attempted to integrate Fazzan with Algeria. WRIGHT, LIBYA, *supra* note 343, at 49.

384. Treaty of Peace with Italy, Feb. 10, 1947, art. 23(1), 49 U.N.T.S. 3, 139.

385. *Id.* art. 23(3), 49 U.N.T.S. at 139; *id.* Annex 11, paras. 1, 3, 49 U.N.T.S. at 214.

386. *Id.* Annex 11, para. 2, 49 U.N.T.S. at 214.

387. *Id.* art. 23(2), 49 U.N.T.S. at 139; see also LANE, *supra* note 11, at 182.

388. See LANE, *supra* note 11, at 190.

389. *Id.*; WRIGHT, LIBYA, *supra* note 343, at 54-55.

390. G.A. Res. 289(IV), U.N. GAOR, 4th Sess., Supp. No. 16, at 10, U.N. Doc. A/1251 (1949).

391. See LANE, *supra* note 11, at 191-92; WRIGHT, LIBYA, *supra* note 343, at 58-59.

392(V), which stated that the Libyan boundaries would be set by negotiations between Libya and France after Libya attained independence.³⁹²

Sanusi influence persisted in the formation of the new Libyan state. In 1920, Italy had recognized Idris al-Sanusi, the son of Muhammad al-Mahdi and successor of Ahmad al-Sharif, as the Amir of Cyrenaica.³⁹³ Idris's status as undisputed leader of Cyrenaica was in large part due to his position within the Sanusi movement.³⁹⁴ Idris cooperated closely with the British during World War II, and from June 1949 he held authority over internal affairs in the provisional government of Cyrenaica.³⁹⁵ The Libyan constitutive assembly unanimously named Idris the King of Libya in December 1950.³⁹⁶ Thus, the grandson of Muhammad bin Ali al-Sanusi headed the new Libyan state, which formally proclaimed its independence on December 24, 1951.³⁹⁷

Franco-Libyan relations had deteriorated by the end of 1954, and Libya asked France to withdraw its forces from Fazzan. Libya also began asserting that its true frontier had been fixed in the 1935 Mussolini-Laval Accords between France and Italy. French patrols intercepted several teams of U.S. nationals exploring for petroleum for Libya and carrying maps showing the 1935 line as the boundary. The French promptly escorted these teams back to the border claimed by France.³⁹⁸ In February 1955 French troops took similar actions with Libyan motorized troops who penetrated the Aouzou Strip at

392. G.A. Res. 392(V), U.N. GAOR, 5th Sess., Supp. No. 20, at 22, U.N. Doc. A/1775 (1960); see LANE, *supra* note 11, at 208; Muller, *supra* note 367, at 174. The French felt that the boundary had already been "fixed by international agreement" and thus, under Resolution 289(IV), did not need to be negotiated. However, the confusion was of their own making. In response to an inquiry by the U.N. Secretariat, the French delegation had stated that the boundary between Libya and the French colonial possessions to the south of it had been fixed by a Franco-Italian protocol of January 10, 1924, which was still in force. The document to which they were referring was the Anglo-French convention of that date; however, the French diplomats failed to mention the Anglo-French agreements of 1898, 1899, and 1919, which the 1924 convention completed. LANE, *supra* note 11, at 206-07.

The mention of a Franco-Italian agreement was enough to remind the Secretariat of the Mussolini-Laval Accords of 1935. In memorandum A/AC/18-103, addressed to the interim commission in January 1950, the Secretariat referred to the 1935 Accords as setting the southeast border of Libya. In addition to reporting the French assertions that these accords had lapsed and possessed no juridical value, the Secretariat noted that there was no record of a 1924 Franco-Italian agreement, but that there was an Anglo-French agreement. *Id.* at 206-07.

In December 1950 the French representative to the General Assembly requested the floor in order to correct the error and to state that the boundary in question was set by agreements in 1899, 1902, and 1919. *Id.* at 207-08. By this time, however, the damage had been done.

For a discussion of the content of the various agreements mentioned, see *infra* notes 825-827, 898-921 and accompanying text.

393. See LANE, *supra* note 11, at 98-99; WRIGHT, LIBYA, *supra* note 343, at 32.

394. See Salaheddin Hasan Sury, *The Political Development of Libya 1952-1969: Institutions, Policies and Ideology*, in LIBYA SINCE INDEPENDENCE: ECONOMIC AND POLITICAL DEVELOPMENT 121, 125 (J.A. Allan ed., 1982).

395. LANE, *supra* note 11, at 192; WRIGHT, LIBYA, *supra* note 343, at 55-56.

396. LANE, *supra* note 11, at 194.

397. *Id.* at 195; WRIGHT, LIBYA, *supra* note 343, at 73.

398. LANE, *supra* note 11, at 209; WRIGHT, LIBYA, *supra* note 343, at 84-85.

Moya with similar maps; France also made two official protests to Tripoli.³⁹⁹ In addition to sponsoring these expeditions, Idris also provided Chadian insurgents with arms, food and bases in Fazzan until Chad's independence in 1960.⁴⁰⁰

In August 1955, however, Libya signed a treaty with France fixing the boundaries according to the lines claimed by France.⁴⁰¹ Libya's acceptance of the French claims contradicts its claim that it genuinely held title to the Aouzou Strip. Possibly, Libya may not have believed that its right to the territory was beyond dispute. Another explanation for the inconsistency—the one relied on by Libya today—argues that Idris's government, beholden to colonial powers for its creation and dependent on their good favor and largesse for its survival, simply lacked the power or the will to oppose the demands of those powers. In other words, Libya asserts that France forced Idris to accept in 1955 a colonial boundary that deprived Libya of territory it rightfully owned.

E. The Chadian Revolt and Libya's Occupation of the Aouzou Strip, 1960-1973

Within ten years of Libyan independence Chad, too, would assume full sovereignty. Here, however, the process occurred under the aegis not of the United Nations, but of France. By the end of 1958 the Territorial Assembly declared, by a unanimous vote, that Chad was an autonomous republic within the French Community, which conducted the republic's foreign relations. Chad achieved full independence and sovereignty in August 1960.⁴⁰² Although the new state was not obligated to accept boundaries previously negotiated by France, it chose not to contest its inherited frontiers.⁴⁰³

This decision was consistent with general postcolonial practice in Africa. The Charter of Addis Ababa, which gave birth to the Organization of African Unity (O.A.U.), recognizes "the territorial integrity of each State," i.e., the inviolability of inherited colonial boundaries.⁴⁰⁴ In July 1964 the O.A.U. voted overwhelmingly to adopt a resolution declaring that "all the member

399. LANE, *supra* note 11, at 210; see also MARY-JANE DEEB, LIBYA'S FOREIGN POLICY IN NORTH AFRICA 42-43 (1991); BENYAMIN NEUBERGER, INVOLVEMENT, INVASION AND WITHDRAWAL: QADHDHAFI'S LIBYA AND CHAD, 1969-1981, at 23 (Shiloah Center for Middle Eastern and African Studies Occasional Papers Series No. 83, 1982); RONALD BRUCE ST. JOHN, QADDAFI'S WORLD DESIGN: LIBYAN FOREIGN POLICY, 1969-1987, at 93-94 (1987). Comarin puts the date of this incident in January 1955. Comarin, *supra* note 11, at 8.

400. DEEB, *supra* note 399, at 42-43.

401. Treaty of Friendship and Good Neighborliness, With Exchange of Notes, Aug. 10, 1955, Fr.-Libya, J.O., Apr. 7, 1957, at 3661, reprinted in BROWNLIE, *supra* note 12, at 30 [hereinafter 1955 Treaty]; see also *infra* notes 783-784 and accompanying text.

402. See LANE, *supra* note 11, at 221.

403. *Id.* at 221-22.

404. Charter of the Organization of African Unity, May 25, 1963, art. 3(3), 479 U.N.T.S. 39, 74 [hereinafter O.A.U. Charter].

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states undertake to respect the existing boundaries at the moment they acceded to independence."⁴⁰⁵ This resolution would preclude Chad and Libya from challenging the borders unless one of the countries asserted that the boundary was still in dispute at the time of its independence.

Chad was independent for only four years before a revolt broke out against the government of President François Tombalbaye. Tombalbaye, like almost all of his government, came from the more populous south of Chad, and the regime was dominated by the black Christian Sara tribes of that region. The revolt began in central Chad, in Ouadai and the neighboring prefecture of Batha, areas populated by Muslim Arabs.⁴⁰⁶ In 1966, the rebels formed the Front de Libération Nationale du Tchad, or FROLINAT, with the goal of uniting the north "under the banner of Islam" and liberating it from southern dominance.⁴⁰⁷

Meanwhile a separate uprising was brewing in B.E.T. After Chadian independence, French military authorities continued to govern the area, but in January 1965, Tombalbaye took control of the region. The Sara troops he installed there merely exacerbated resentment against his regime. In March Toubou rebels responding to alleged brutalities drove the Sara troops in Aouzou from their post, forcing Tombalbaye to appeal to France for aid. However, the unrest in B.E.T. remained separate from the FROLINAT revolt until 1968.⁴⁰⁸ The Libyan government began wooing the Toubous, and in December 1966 the *Derde*, Oueddei Kichidemi, fled to Tripoli.⁴⁰⁹

In March 1968, Toubou guards at Aouzou revolted and massacred the regular garrison, which was composed of troops drawn from the south. After an unsuccessful attempt to retake the town and another request for French aid, Tombalbaye's troops briefly recaptured Aouzou in September, but it fell again to the rebels soon afterward. The revolt continued to spread throughout B.E.T. in 1969, and Tombalbaye's government lost control over the entire region except for posts at Faya, Fada, Bardaï, and Ounianga.⁴¹⁰

Tibesti, however, entered the rebellion partly as a result of its own internal schisms, which pitted the sons and partisans of *Derde* Oueddei Kichidemi against adherents of the former *Derde*, Chai. An arrangement between Chai's supporters and the government forced Oueddei's side into rebellion. When the older son of Oueddei and the grandson of Chai both died in combat, leadership

405. O.A.U. Res. AHG/16(I), July 21, 1964 [hereinafter Cairo Resolution], reprinted in BA ET AL., *supra* note 2, at 143.

406. LANNE, *supra* note 11, at 226.

407. JOHN K. COOLEY, LIBYAN SANDSTORM 196 (1982); see also LANNE, *supra* note 11, at 226.

408. See LANNE, *supra* note 11, at 226.

409. LANNE, *supra* note 11, at 226; see also THOMPSON & ADLOFF, *supra* note 45, at 47. According to Comarin, the *Derde* fled in 1965. Comarin, *supra* note 11, at 8.

410. LANNE, *supra* note 11, at 226; THOMPSON & ADLOFF, *supra* note 45, at 55; Comarin, *supra* note 11, at 8.

of the rebel movement in Tibesti, now calling itself the Forces Armées du Nord (F.A.N.) or the Second Liberation Army (to distinguish it from the First Liberation Army operating in the east and center of Chad), devolved in April 1969 upon Goukouni Oueddei, the younger son of *Derde Oueddei*.⁴¹¹

At this point, F.A.N. joined forces with FROLINAT.⁴¹² King Idris had been supplying material aid to FROLINAT, under the leadership of 'Abu Siddiq, the head of the rebellion, and had been allowing F.A.N. to operate out of Tripoli.⁴¹³ In August 1971 Colonel Mu'ammar 'al-Qaddafi, who had seized control of Libya from King Idris in a coup in September 1969, sponsored an attempt at Kufrah to unite FROLINAT's two armies. This initiative failed as a result of the Second Army's refusal to accept Siddiq, Qaddafi's candidate, as the secretary-general of the organization. As a result, Qaddafi imprisoned Goukouni Oueddei, Siddiq's rival, in Tripoli until April 1972.⁴¹⁴

Although he expelled approximately one thousand "rebels"—former Toubou bodyguards of King Idris—from Libya into Chad in June 1970,⁴¹⁵ Qaddafi redoubled Libya's efforts to forge ties with the Chadian north. In August 1971 Tombalbaye accused Libya of fomenting a coup against his government and severed relations with Libya, offering aid to anyone who would overthrow Qaddafi. Libya responded by recognizing FROLINAT as the true representative of the Chadian people.⁴¹⁶ Early in 1971 Qaddafi also published Libyan claims to the area, based on the 1935 Mussolini-Laval Accords.⁴¹⁷

However, the rupture between Tombalbaye and Qaddafi lasted only six months. In 1972, Tombalbaye made an abrupt about-face, breaking off relations with Israel in November and immediately travelling to Tripoli on Qaddafi's invitation. In December, he signed a treaty of amity, cooperation, and mutual assistance with Qaddafi, hoping to end Libyan support for the rebels.⁴¹⁸

Libyan military vehicles had crossed the border into Aouzou in April and November of 1972 and again in January 1973, when the Libyans distributed

411. CHAPELLE, *PEUPLE TCHADIEN*, *supra* note 46, at 272.

412. *See* CHAPELLE, *PEUPLE TCHADIEN*, *supra* note 46, at 272, at 55-56.

413. *Id.* at 121; NEUBERGER, *supra* note 399, at 23; WRIGHT, *CENTRAL SAHARA*, *supra* note 26, at 128-29; Younès Berri & Saleh Kebzabo, *Que fait Kaddafi au Tchad?*, *JEUNE AFRIQUE*, Sept. 26, 1975, at 20.

414. THOMPSON & ADLOFF, *supra* note 45, at 60; *see also* CHAPELLE, *PEUPLE TCHADIEN*, *supra* note 46, at 273; KAYE WHITEMAN, *MINORITY RIGHTS GROUP*, CHAD 7 (1988).

415. L'ANNE, *supra* note 11, at 227; WHITEMAN, *supra* note 414, at 7. In the summer of 1970 opponents of Qaddafi, including one member of the Sanusi family, used Chad as a base in an unsuccessful conspiracy aimed at ousting him. The incident may account in part for Qaddafi's obsession with Chad. *See* Lemarchand, *The Case*, *supra* note 50, at 109-10.

416. L'ANNE, *supra* note 11, at 227; *see also* THOMPSON & ADLOFF, *supra* note 45, at 122.

417. Nourredine Abdi, *Common Regional Policy for Algeria and Libya: From Maghribi Unity to Saharan Integration*, in *SOCIAL AND ECONOMIC DEVELOPMENT OF LIBYA* 215, 224 (E.G.H. Joffé & K.S. McLachlan eds., 1982).

418. L'ANNE, *supra* note 11, at 227-28; ST. JOHN, *supra* note 399, at 97; Berri & Kebzabo, *supra* note 413, at 20; *see also* NEUBERGER, *supra* note 399, at 27-28.

provisions and inoculated the population. Between January and March the Libyans settled permanently in Aouzou, installing a new administration and distributing Libyan identification cards to the population.⁴¹⁹ In 1973 Libya built an airstrip defended by ground-to-air missiles.⁴²⁰ Reports circulated in 1975 that Libya had annexed the Aouzou Strip and attached it to the Libyan administrative center at Kufrah, 670 kilometers away,⁴²¹ but Libya denied annexing the territory.⁴²² Since 1976 official Libyan maps have shown the area as part of Libya.⁴²³ The occupation was entirely unannounced, and neither Chad nor Libya made any official statements.⁴²⁴ The circumstances surrounding the Libyan occupation, including the preceding agreement between Tombalbaye and Qaddafi and the silence of both governments, have given rise to speculation that Tombalbaye essentially sold the Aouzou Strip to Libya.⁴²⁵ Indeed, in 1987 Libya released a letter allegedly written by Tombalbaye in which he purported to cede the Aouzou Strip to Libya.⁴²⁶

Thus, the Chadian rebellion presented King Idris and then Colonel Qaddafi with an opportunity to extend Libyan influence southward and possibly to acquire some territory. The involvement of Idris supports Libyan claims to the Aouzou Strip as longstanding, based on kinship and tribal ties arising from shared history and the influence of the Sanusi movement. Although Qaddafi's policy of exploiting anarchy in Chad to harass Tombalbaye and build ties to the Toubous did allow him to occupy the Aouzou Strip unnoticed and unopposed, the shifting alliances and fortunes of the civil war in the subsequent years would quickly change the situation.

419. LANE, *supra* note 11, at 228; Abdi, *supra* note 417, at 224; Dial Torgerson, *Chad Officials Admit Libyans Occupy 27,000 Square Miles*, INT'L HERALD TRIB., Sept. 26, 1975, reprinted in DOMINIQUE SOULAS DE RUSSEL, TSCHAD—OBJEKT NATIONALER UND INTERNATIONALER MACHTKÄMPFE 44 (1981); see also Berri & Kebzabo, *supra* note 413, at 18, 20. Chad complained to the United Nations that the Libyan military presence in the area actually began in 1971. According to Chad, by 1973 Libya was occupying the area ceded by France in the 1935 Mussolini-Laval Accords. *Memorandum concerning the occupation of Tibesti by Libya*, U.N. SCOR, 38th Sess., Supp. for Jan.-Mar. 1983, at 65, U.N. Doc. S/15649, Annex 2 app. (1983) [hereinafter *Chad Memorandum*].

420. WRIGHT, CENTRAL SAHARA, *supra* note 26, at 130.

421. LANE, *supra* note 11, at 228; Kellner, *supra* note 11, at 1. The annexation was announced in the Tripoli newspaper *Al-Fatih* but not in sources traditionally monitored by Western states. *Id.*

422. *Libya Denies News Report She Annexed Part of Chad*, N.Y. TIMES, Sept. 9, 1975, at A9.

423. *New Libyan Maps Annex Territory from 3 Neighbors*, N.Y. TIMES, Sept. 10, 1976, § 1, at 3. According to the maps, distributed by the Information Division of the Libyan Foreign Ministry, Libya owned not only 37,000 square miles of formerly Chadian territory but also 7,500 square miles of Algeria and 7,500 square miles of Niger. *Id.*; see also *Le litige entre le Tchad et la Libye*, AFRIQUE CONTEMPORAINE, Sept.-Oct. 1977, at 17, 18 [hereinafter *Le litige*].

424. LANE, *supra* note 11, at 228-29.

425. For a discussion of these allegations, see *infra* notes 847-851 and accompanying text.

426. See *infra* notes 844-846 and accompanying text.

*F. Changing Alignments and Attempts to Resolve the Dispute, 1973-1991**1. Overview*

The years after 1973 saw Chad descend further into chaos. The Libyan annexation widened the schism within F.A.N. between Siddiq and Goukouni that had thwarted attempts to unify FROLINAT in 1971. Because the occupation discredited Siddiq among the Toubous, Libya sought a new ally in its former prisoner, Goukouni, who commanded F.A.N. along with Hissène Habré.⁴²⁷ Much to Qaddafi's chagrin, Goukouni's refusal to accept the Libyan occupation of the Aouzou Strip ultimately broke up this alliance. Habré eventually emerged as the sole ruler of Chad. In 1987, he expelled the Libyan forces that had invaded B.E.T. from almost all of northern Chad, except the Aouzou Strip. Numerous attempts to resolve the Aouzou Strip dispute during this period all failed, until Habré and Qaddafi finally decided in 1990 to submit the question of the Aouzou Strip to the International Court of Justice.

2. The Malloum Government, Bilateral Discussions, and the Bongo Committee, 1975-1978

In April 1975 a military coup drove Tombalbaye from power and created a new government led by General Félix Malloum. The Malloum government, however, was no more successful in ending the rebellion than Tombalbaye's government had been. In 1976, Goukouni, who had in October deposed Habré as sole leader of F.A.N. (which he renamed Force Armée Populaire (F.A.P.)), controlled the northern half of Chad.⁴²⁸

The Malloum government, which upon taking power had not mentioned the Aouzou Strip, chose to try to negotiate a solution with Libya while consolidating its control over Chad. According to Chad, the first bilateral discussions had taken place in 1974, before the overthrow of Tombalbaye. Two high-ranking Chadian officials travelled to Tripoli, met with Libyan officials, and brought up the matter of Libya's occupation of the Aouzou Strip. Libya asserted that its police forces, not military units, had entered Aouzou to maintain order there. It further claimed that a 1966 treaty of friendship (1966 Treaty) between Libya and Chad permitted this action. Chad countered that the Libyan units were in fact military forces, and that even if they were police units the occupation was impermissible, because the 1966 Treaty required

427. COOLEY, *supra* note 407, at 197.

428. The split between Goukouni and Habré mirrored tribal divisions; Goukouni held the support of the Teda, while Habré retreated to Borku with several hundred Anakazza followers. NEUBERGER, *supra* note 399, at 36.

cooperative bilateral efforts to maintain order along the border.⁴²⁹ The meetings ended without any decision.

Following Malloum's coup, Algeria and Niger attempted mediation of the dispute, but their efforts were in vain.⁴³⁰ Malloum sent one of his ministers to Tripoli in late July 1976, where discussions again turned to the Aouzou Strip. Libya denied that there was a boundary problem but offered to discuss the matter if Chad insisted. Libya then claimed title under the Mussolini-Laval Accords and produced a map from the 1956 Oxford Atlas showing the Aouzou Strip in Libya. Chad responded that the Mussolini-Laval Accords had never entered into force. These meetings, too, ended inconclusively, with the two parties agreeing to create a Joint Technical Commission to study the matter and propose solutions.⁴³¹

The Joint Technical Commission met in N'Djamena to discuss the matter in late June 1977. Libya again denied the existence of a problem, and repeated that international agreements, in particular the Mussolini-Laval Accords, supported its claim to the territory. Chad again denied the effectiveness of that agreement and asserted its own claims based on the 1955 Treaty. Libya responded that it had not been truly free between 1951 and 1969 (the years of the monarchy under Idris), and the meeting again broke off without any result.⁴³² Rebel activity in northern Chad began to intensify during this period, making negotiation increasingly difficult.

As Goukouni's forces continued to press southward with Libyan-supplied arms, the French air force eventually had to act to stop his advance.⁴³³ After the French intervention Goukouni quarreled with a faction of the F.A.P. led by a Qaddafi protégé, Acyl Ahmad. Although Qaddafi looked to Goukouni as a potential ally, Goukouni criticized Libya's occupation of the Aouzou Strip and even proposed a truce with Malloum so that their combined forces could expel the Libyans from the area.⁴³⁴ Indeed, it was Goukouni's forces that

429. *Chad Memorandum*, *supra* note 419, at 65-66; *Provisional Verbatim Record of the 2429th Meeting*, U.N. SCOR, 38th Sess., 2429th mtg. at 52, U.N. Doc. S/PV.2429 (1983) [hereinafter *2429th Meeting*] (statement of Mr. Barma). In Article 1(1) of the agreement Libya and Chad each promised to "take all possible measures to ensure the maintenance of order and security [on their frontier] through liaison and co-operation between their security services." Agreement on Good Neighborliness and Friendship, Mar. 2, 1966, Chad-Libya, *quoted in Chad Memorandum*, *supra* note 419, at 68 [hereinafter 1966 Treaty].

430. *Le litige*, *supra* note 423, at 17.

431. The parties did not draw up minutes of the meeting or issue a communiqué. *Chad Memorandum*, *supra* note 419, at 66; *2429th Meeting*, *infra* note 429, at 52-53 (statement of Mr. Barma); *see also* THOMPSON & ADLOFF, *supra* note 45, at 124-25.

432. The parties again left no minutes of the meeting and did not issue a communiqué. *Chad Memorandum*, *supra* note 419, at 66; *2429th Meeting*, *supra* note 429, at 53-56 (statement of Mr. Barma).

433. THOMPSON & ADLOFF, *supra* note 45, at 125; *see also* NEUBERGER, *supra* note 399, at 38.

434. Jean Gueyras, *Le différend frontalier entre Tripoli et N'Djamena*, LE MONDE, July 28, 1977, at 2; *see also* COOLEY, *supra* note 407, at 197. Goukouni claimed in an interview that he had "circulated several pamphlets" and affirmed that "Aouzou is an integral part of Chad. We will never accept the Libyans staying in this district." However, Goukouni felt that the Aouzou Strip had to take a second priority to the

defeated Qaddafi's Islamic Legion, composed of Muslim mercenaries from other countries, when it tried to capture Faya in June.⁴³⁵

Frustrated by the failure of attempts to reach a negotiated settlement, the Malloum government brought the matter to the O.A.U. The time was opportune because the recent rebel operations at Bardai, Zouar, and Ounianga had made it obvious that Qaddafi was supplying F.A.P.⁴³⁶ At the meeting of the O.A.U. Council of Ministers on June 29, 1977—immediately after the end of the Joint Technical Committee meeting in N'Djamena—Lieutenant-Colonel Wadal 'Abd-al-Qadar (Abdelkadar) Kamougué, the Chadian Minister of Foreign Affairs, requested that the question of "Libyan aggression against Chad and occupation of a part of Chadian territory by Libya" be placed on the agenda of the upcoming Fourteenth Conference of Heads of State.⁴³⁷ After "lively" debates, the Council of Ministers acceded to Chad's request.⁴³⁸ At the Conference of Heads of State (or Summit) at Libreville in July 1977, General Malloum charged Libya with aggression against Chad and outlined Chad's claims to the Aouzou Strip. The Libyan representative presented the Libyan side of the matter but failed to produce any direct evidence in support of Libya's claims.⁴³⁹ The O.A.U. then decided to form a committee composed of delegates from six nations, the Bongo Committee.⁴⁴⁰

The Bongo Committee first met in Libreville on August 10-12, 1977. It issued a resolution reaffirming the principle of the inviolability of colonial frontiers and establishing a Sub-Committee of Experts, made up of jurists and cartographers.⁴⁴¹ The subcommittee met in January 1978,⁴⁴² but Libya's refusal to participate in the meeting and to provide documentation to support its claim scuttled the subcommittee's efforts.⁴⁴³ Chadian President Malloum

success of the revolution, and he therefore continued to maintain close relations with Tripoli. Lemarchand, *The Case*, *supra* note 50, at 116; Gueyras, *supra*, at 2.

435. THOMPSON & ADLOFF, *supra* note 45, at 126; *see also* ST. JOHN, *supra* note 399, at 101.

436. *See* L'ANNE, *supra* note 11, at 232.

437. *Le litige*, *supra* note 423, at 17; EDMOND JOUVE, *L'ORGANISATION DE L'UNITÉ AFRICAINE* 155 (1984); *see also* Nicholas Ashford, *African States in Bitter Clashes Over Disputed Territory at OAU Council of Ministers*, *THE TIMES* (London), July 1, 1977, at 9.

438. *Le litige*, *supra* note 423, at 18.

439. *Id.*; Nicholas Ashford, *Dr. Kaunda Supports Rhodesia Violence*, *THE TIMES* (London), July 5, 1977, at 1, 6. The O.A.U. spokesman reportedly described the Libyan case as "not very convincing." *Le litige*, *supra* note 423, at 18.

440. *See* L'ANNE, *supra* note 11, at 232-33, 236; Colin Legum, *Libya's Intervention in Chad*, in *CRISIS AND CONFLICTS IN THE MIDDLE EAST* 54-57 (Colin Legum ed., 1981); JOUVE, *supra* note 437, at 155-61; WHITEMAN, *supra* note 414, at 9.

441. *Chad-Libya: Mediation Committee Meeting*, *AFR. RES. BULL.*, Aug. 1977, at 4524-25; *Le litige*, *supra* note 423, at 18; *see also* *Official Record of the 2060th Meeting*, U.N. SCOR, 33d Sess., 2060th mtg. at 3, U.N. Doc. S/PV.2060 (1978) [hereinafter *2060th Meeting*] (statement of Mr. Kamougué); *2429th Meeting*, *supra* note 429, at 3 (statement of Mr. Barma); JOUVE, *supra* note 437, at 155. The members of the commission were Senegal, Algeria, Nigeria, Mozambique, Gabon, and Cameroon.

442. JOUVE, *supra* note 437, at 156.

443. *2060th Meeting*, *supra* note 441, at 3 (statement of Mr. Kamougué); *2429th Meeting*, *supra* note 429, at 57 (statement of Mr. Barma). Libya justified its actions by citing hostile actions taken by Chad,

stated, "We're waiting for Libya to defend its position with texts in support. It has done nothing. It contents itself with presenting maps."⁴⁴⁴ While the pressure from the rebels in the north continued to mount, other negotiations taking place in Niamey, Niger proved equally fruitless.

Finally, on February 6, while these negotiations were in progress, Malloum suspended diplomatic relations with Libya, again citing Libyan aggression against Chad and the occupation of the Aouzou Strip.⁴⁴⁵ Malloum also brought the matter of Libya's occupation of Tibesti before the U.N. Security Council.⁴⁴⁶ Colonel Kamougué appeared before the Security Council shortly afterward and presented Chad's side.⁴⁴⁷ Libya denied occupying the Aouzou Strip and asserted that the real problem was the Chadian rebellion.⁴⁴⁸ Sudanese President and incoming O.A.U. Chairman Ja'far Numairiy offered his mediation services to both Chad and O.A.U. Chairman Bongo.⁴⁴⁹ This effort, too, came to naught. Before the Security Council could act, however, Malloum had reached an agreement with the rebels and with Libya in which he agreed to withdraw the complaint and to resume ties with Libya.⁴⁵⁰

This sudden turn of events stemmed from the exigencies of the Chadian rebellion, which began to overshadow the legal question of the boundary. Under increasing pressure from Goukouni Oueddei's Libyan-backed rebels, Malloum attended conferences convened by Qaddafi with the support of Niger

including an ordinance prohibiting the movement and freezing the assets of Libyan nationals in Chad. 2060th Meeting, *supra* note 441, at 3 (statement of Mr. Kamougué), 9 (statement of Mr. Kikhia); *Chad Memorandum*, *supra* note 419, at 69; see also JOUVE, *supra* note 437, at 156.

444. *Le général Malloum "fait confiance à l'O.U.A." pour résoudre le différend frontalier du Tchad avec la Libye*, LE MONDE, Nov. 2, 1977, reprinted in SOULAS DE RUSSEL, *supra* note 419, at 47.

445. *Chad Breaks Links With Libya*, N.Y. TIMES, Feb. 7, 1978, at A2; *N'Djamena suspend ses relations avec la Libye*, LE MONDE, Feb. 7, 1978, at 8.

446. *Letter from the Representative of Chad to the President of the Security Council (Feb. 6, 1978)*, U.N. SCOR, 33d Sess., Supp. No. 1, at 23, U.N. Doc. S/12554 (1978); *Letter from the Representative of Chad to the President of the Security Council (Feb. 8, 1978)*, U.N. SCOR, 33d Sess., Supp. No. 1, at 23-24, U.N. Doc. S/12553 (1978).

447. Specifically, Kamougué stressed, on one hand, the 1955 Treaty and the colonial treaties to which it refers, and, on the other, the invalidity of the 1935 Mussolini-Laval Accords. He also noted that Libya had agreed to respect colonial boundaries by signing the Cairo Resolution. See 2060th Meeting, *supra* note 441, at 2 (statement of Mr. Kamougué). The Chadian Government also argued that Libya's failure to cooperate with the O.A.U. Sub-Committee of Experts necessitated his resort to the Security Council. *Telex from President Malloum to the President of the Security Council (Feb. 8, 1978)*, U.N. SCOR, 33d Sess., Supp. No. 1, at 24, U.N. Doc. S/12555 (1978); see also *N'Djamena accuse la Libye d'être intervenue militairement aux côtés de FROLINAT à Faya-Largeau*, LE MONDE, Feb. 12, 1978, at 3.

448. 2060th Meeting, *supra* note 441, at 6, 9 (statement of Mr. Kikhia).

449. *Sudan Offers Help to Chad*, N.Y. TIMES, Feb. 12, 1978, at A33.

450. See *infra* note 451 and accompanying text; see also *Letter from the Representative of Libya to the President of the Security Council (Feb. 18, 1978)*, U.N. SCOR, 33d Sess., Supp. 1, Jan.-Mar. 1978, at 40-41, U.N. Doc. S/12568 (1978); *Letter from the Representative of Chad to the President of the Security Council (Feb. 21, 1978)*, U.N. SCOR, 33d Sess., Supp. 1, Jan.-Mar. 1978, at 42, U.N. Doc. S/12570 (1978) (notifying President of Security Council of agreement); *Letter from the Representative of Chad to the President of the Security Council (Feb. 22, 1978)*, U.N. SCOR, 33d Sess., Supp. 1, Jan.-Mar. 1978, at 42-43, U.N. Doc. S/12572 (1978) (withdrawing Chadian complaint); *Chad Resumes Ties With Libya*, N.Y. TIMES, Feb. 19, 1978, at A4.

and Sudan in Sebha and Banghazi in early 1978. Malloum and Goukouni signed a cease-fire in which Malloum agreed to withdraw his complaint at the O.A.U. and the Security Council, but once Chad had complied the cease-fire never took effect.⁴⁵¹

3. *Goukouni, Habré, and the GUNT, 1979-1982*

In August 1978 Sudanese mediation had led to an accommodation between Habré and Malloum, and the new government continued to charge Libya with aggression throughout 1978.⁴⁵² Malloum again submitted the dispute at the fifteenth O.A.U. Summit, held in Khartoum in 1978. The O.A.U. appointed a new ad hoc committee to negotiate a cease-fire between the Chadian government and FROLINAT.⁴⁵³ These efforts were fruitless.⁴⁵⁴

Six months later, in February 1979, Chad experienced yet another change of government as the Malloum-Habré coalition⁴⁵⁵ disintegrated and plunged the country once more into chaos.⁴⁵⁶ In March, the mediation of the ad hoc committee arranged a temporary cease-fire between the warring Chadian factions.⁴⁵⁷ The so-called Kano Accords united Habré and Goukouni, the two Toubou leaders, in a National Transitional Union Government (GUNT) that excluded pro-Libyan Arab factions.⁴⁵⁸ The GUNT never achieved stability. At the O.A.U. Summit in Monrovia in July, talks focused on ending the fighting and foreign intervention and on encouraging a national unity government.⁴⁵⁹ The O.A.U. sponsored further meetings at Lagos, Nigeria in August, which produced the Lagos Accord.⁴⁶⁰ This agreement expanded the GUNT to include the pro-Libyan factions and, like its predecessor, proclaimed a cease-fire and established a second GUNT. The Lagos Accord also called for the O.A.U. to send a peace-keeping force to Chad.⁴⁶¹

However, the broad support gained in the Lagos Accord was not enough to sustain the GUNT, and the O.A.U. peacekeeping force proved to be a paper

451. Joint Communiqué, Mar. 27, 1978, reprinted in MICHAEL P. KELLEY, *A STATE IN DISARRAY: CONDITIONS OF CHAD'S SURVIVAL* 155-56 (1986); see also NEUBERGER, *supra* note 399, at 33-35; WHITEMAN, *supra* note 414, at 10; Legum, *supra* note 440, at 54.

452. THOMPSON & ADLOFF, *supra* note 45, at 126; see also NEUBERGER, *supra* note 399, at 39.

453. JOUVE, *supra* note 437, at 156. The states represented on the committee—Sudan, Cameroon, Niger, and Nigeria—all shared borders with Chad and thus had a stake in the matter.

454. LANE, *supra* note 11, at 233.

455. See WHITEMAN, *supra* note 414, at 10.

456. NEUBERGER, *supra* note 399, at 40-41.

457. Kano Accords on National Reconciliation, Mar. 14, 1979 [hereinafter Kano Accords], reprinted in KELLEY, *supra* note 451, at 157-61.

458. *Id.*; see also COOLEY, *supra* note 407, at 197-98; JOUVE, *supra* note 437, at 157; KELLEY, *supra* note 451, at 69-71; NEUBERGER, *supra* note 399, at 43.

459. Legum, *supra* note 440, at 54.

460. Lagos Accord on National Reconciliation in Chad, Aug. 18, 1979 [hereinafter Lagos Accord], reprinted in KELLEY, *supra* note 451, at 162-66.

461. *Id.*; see also WHITEMAN, *supra* note 414 at 11; JOUVE, *supra* note 437, at 157.

tiger. Only the Congo provided its quota of troops, promised funds never materialized, and the O.A.U. forces stood aside as Habré's forces battled the GUNT for control of Chad. By the next O.A.U. summit in Freetown in July 1980 Goukouni had ousted Habré from the GUNT, the GUNT had disintegrated, and the civil war had intensified.⁴⁶²

The Bongo Committee met several times in late 1980 and hammered out with Goukouni a five-point agreement that basically reiterated the formula of the Lagos Accord. But Habré refused to participate or to sign a cease-fire so long as Libyan forces remained in Chad.⁴⁶³

While these meetings were taking place Libya was massing its forces in collaboration with Goukouni, who turned to Qaddafi and signed a treaty of friendship in June 1980⁴⁶⁴ that would serve to justify increasing Libyan intervention in Chad later that year.⁴⁶⁵ In October up to 7,000 Libyan soldiers, supported by the Libyan air force, struck into territory held by Habré. By December Qaddafi's forces had reached N'Djamena, which they captured shortly before the meeting of the Bongo Committee on December 23-24.⁴⁶⁶ Habré finally signed the five-point agreement but insisted that the GUNT, which had just driven him from power, was illegal.⁴⁶⁷ The Bongo Committee issued a communiqué that once again reaffirmed the principles of the Lagos Accord and demanded the withdrawal of all foreign troops from Chad.⁴⁶⁸ Undeterred by the criticism, Qaddafi proceeded within two weeks to sign an agreement of merger with Goukouni.⁴⁶⁹

Qaddafi, however, had moved too quickly. African leaders, galvanized by this sudden development, vigorously denounced Libya and prompted the O.A.U. to call a meeting of its Chad subcommittee within a week. The subcommittee, meeting in Lomé, Togo, voted to condemn Libya as a violator

462. Legum, *supra* note 440, at 54-55; see also COOLEY, *supra* note 407, at 198; JOUVE, *supra* note 437, at 158; KELLEY, *supra* note 451, at 51; NEUBERGER, *supra* note 399, at 45-50; WHITEMAN, *supra* note 414, at 11.

463. Legum, *supra* note 440, at 55; see also JOUVE, *supra* note 437, at 158-59; KELLEY, *supra* note 451, at 51.

464. Treaty of Friendship and Alliance, June 15, 1980, Libya-Chad, reprinted in KELLEY, *supra* note 451, at 143-45.

465. ST. JOHN, *supra* note 399, at 100; see also COOLEY, *supra* note 407, at 198; WHITEMAN, *supra* note 414, at 12.

466. COOLEY, *supra* note 407, at 205-06; Legum, *supra* note 440, at 56; see also NEUBERGER, *supra* note 399, at 49-50.

467. JOUVE, *supra* note 437, at 159-160; KELLEY, *supra* note 451, at 73.

468. *Final Communiqué*, Dec. 24, 1980, Annex IV, O.A.U. Doc. AHG/104 (XVIII) Annex IV, reprinted in KELLEY, *supra* note 451, at 170-71; see also Legum, *supra* note 440, at 56.

469. Communiqué on Unification, Jan. 6, 1981, Chad-Libya, reprinted in NEUBERGER, *supra* note 399, at 69-72; see also *Les 2 pays vont "s'unir totalement en une seule Jamahiriya,"* CAMEROON TRIB., Jan. 8, 1981, reprinted in SOULAS DE RUSSEL, *supra* note 419, at 244; THOMPSON & ADLOFF, *supra* note 45, at 138.

of Chad's sovereignty.⁴⁷⁰ The conference put off a final decision until the eighteenth O.A.U. Summit, to be held in Nairobi in June.⁴⁷¹

The Libyan move also disturbed France, which had improved its relationship with Libya as a result of Libya's efforts to secure the release of Françoise Claustre, a French archaeologist whom Habré's forces had kidnapped in Bardaï in 1974 and held as a hostage for three years. The French stance hardened notably after the Libyan intervention in 1980-1981; France strongly denounced the action and offered aid to Chad's francophone neighbors.⁴⁷² Faced with a blizzard of protest, Libya quickly backed away from the merger project.⁴⁷³

The O.A.U. moderated its tone somewhat in the summer of 1981. The Nairobi summit issued a resolution calling for an O.A.U. force to replace the Libyan troops in Chad. Later in the year, Goukouni announced that he had asked the Libyans to leave. Prodded by O.A.U. threats to boycott the 1982 O.A.U. Summit, which was slated to meet in Tripoli, Qaddafi began to withdraw his forces.⁴⁷⁴ As the Libyans commenced an orderly withdrawal, three thousand soldiers under the O.A.U. aegis replaced them.⁴⁷⁵ In February 1982 the Bongo Committee called on Goukouni to negotiate with Habré, but Goukouni refused.⁴⁷⁶ The O.A.U. force, however, seemed more intent on sidestepping conflict than on preserving peace, and it proved to be utterly worthless.⁴⁷⁷ Habré, sensing the disappearance of obstacles, and benefitting from material help and training provided by the U.S. Central Intelligence Agency (C.I.A.), entered N'Djamena in June 1982 to assume the leadership of Chad once again.⁴⁷⁸ The Bongo Committee was reconvened amid O.A.U. calls for a cease-fire.⁴⁷⁹

470. *Final Communiqué of the Conference of Lomé, Jan. 14, 1981*, Annex V, O.A.U. Doc. AHG/104(XVIII) [hereinafter *Lomé Communiqué*], reprinted in KELLEY, *supra* note 451, at 172-73; see also NEUBERGER, *supra* note 399, at 53-54; THOMPSON & ADLOFF, *supra* note 45, at 138; Legum, *supra* note 440, at 57; *Projet de fusion Tchad-Libye: Le refus de l'Afrique*, AFRIQUE NOUVELLE, Jan. 27, 1981, reprinted in SOULAS DE RUSSEL, *supra* note 419, at 270-73; JOUVE, *supra* note 437, at 160. The merger agreement provoked a particularly vigorous O.A.U. reaction because it coincided with the revelation of Libyan attempts to subvert several other African governments. See Colin Legum, *African States and the Middle East*, in CRISIS AND CONFLICTS IN THE MIDDLE EAST 111, 112-13 (Colin Legum ed., 1981); NEUBERGER, *supra* note 399, at 53.

It seems clear that Goukouni did not sign the agreement willingly but was compelled to sign it by threats he received in Tripoli. See NEUBERGER, *supra* note 399, at 51; Legum, *supra* note 440, at 57. Indeed, after the chorus of African protest forced Libya to retreat from the unification project, Goukouni's government quickly seized the opportunity to distance itself from the endeavor. NEUBERGER, *supra* note 399, at 54-55.

471. Legum, *supra* note 440, at 57; see also JOUVE, *supra* note 437, at 160.

472. THOMPSON & ADLOFF, *supra* note 45, at 140.

473. NEUBERGER, *supra* note 399, at 54.

474. *Id.* at 58.

475. WHITEMAN, *supra* note 414, at 12.

476. *Id.*

477. *Id.*

478. See Jay Ross, *OAU Crisis Seen Isolating Qaddafi; Libya Blamed for Letting Issue of Chad Block Summit*, WASH. POST, Nov. 27, 1982, at A22.

479. JOUVE, *supra* note 437, at 161.

4. *The Habré and Deby Governments, 1982-1991*

At an O.A.U. meeting in Tripoli in November 1982, Qaddafi continued to promote Goukouni as the legitimate Chadian head of state and to block the seating of Habré's delegation, but he was thwarted by protests from the francophone African leaders.⁴⁸⁰ The meeting then broke up, frustrating Qaddafi's bids to have the next summit held in Tripoli and to become the next O.A.U. chairman.⁴⁸¹ Qaddafi tried again, without success, at the Addis Ababa summit in June 1983. At this point Libya changed tactics. It stepped up its aid to Goukouni, who, supported by Libyan air strikes, briefly took Faya-Largeau and Abéché from Habré in July.⁴⁸² In the meantime the O.A.U. held further unsuccessful talks on Chad, at Addis Ababa in January and at Brazzaville in July.⁴⁸³

While Libyan aid to Goukouni was escalating in the spring of 1983, Habré complained to the U.N. Security Council and requested action to remove the Libyan troops from the Aouzou Strip.⁴⁸⁴ Appearing on behalf of Chad, Foreign Minister Idris Miskine presented the Chadian case as Colonel Kamougué had done in 1978, relying on the 1955 Treaty and the colonial agreements to which it referred, and asserting the invalidity of the Mussolini-Laval Accords.⁴⁸⁵ Chad circulated a memorandum in support of its position, with the essential treaties annexed, reciting the various agreements on which its claim rested and the history of past attempts to settle the dispute.⁴⁸⁶

Libya at first refused to address the complaint, since it was submitted by a government it did not recognize as legitimate. It accused Habré of obstructing peace in Chad in a quest for personal power.⁴⁸⁷ It then moved to counter the Chadian claims. First, Libya pressed claims of historical unity between the Libyan and Chadian peoples.⁴⁸⁸ It asserted the validity of the

480. WHITEMAN, *supra* note 414, at 13.

481. Ross, *supra* note 478, at A22.

482. WHITEMAN, *supra* note 414, at 13. Habré filed a complaint with the Security Council, but no action was forthcoming. See *infra* note 496.

483. WHITEMAN, *supra* note 414, at 13.

484. *Letter from the Representative of Chad to the President of the Security Council (Mar. 16, 1983)*, U.N. SCOR, 38th Sess., Supp. for Jan.-Mar., at 61, U.N. Doc. S/15643 (1983); *Letter from the Representative of Chad to the President of the Security Council (Mar. 17, 1983)*, U.N. SCOR, 38th Sess., Supp. for Jan.-Mar., at 61-62, U.N. Doc. S/15644 (1983). Libya responded that it was not occupying any Chadian territory, and that "[t]he Aouzou sector is an integral part of Libyan territory, its inhabitants are Libyan and they have held Libyan identity cards since independence." *Letter from the Representative of Libya to the President of the Security Council (Mar. 17, 1983)*, U.N. SCOR, 38th Sess., Supp. No. 1, at 62, U.N. Doc. S/15645 (1983).

485. *Provisional Verbatim Record of the 2419th Meeting*, U.N. SCOR, 38th Sess., 2419th mtg. at 6-11, U.N. Doc. S/PV.2419 (1983) [hereinafter *2419th Meeting*] (statement of Mr. Miskine); see also *2429th Meeting*, *supra* note 429, at 52-57 (statement of Mr. Barma).

486. See *Chad Memorandum*, *supra* note 419.

487. *2419th Meeting*, *supra* note 485, at 13-25 (statement of Mr. Treiki).

488. *Id.* at 16 (statement of Mr. Treiki).

Mussolini-Laval Accords⁴⁸⁹ and attacked the validity of the 1955 Treaty, claiming that its rejection by the Libyan legislature proved it did not represent the wishes of the Libyan people.⁴⁹⁰ Libya denied that France or Chad had ever exercised sovereignty over the Aouzou Strip and asserted that the area belonged to the Ottoman Empire when the French arrived.⁴⁹¹ Finally, Libya urged the Security Council to refrain from considering the boundary issue, both because the O.A.U. was dealing with the matter and because the Security Council lacked competence to resolve this kind of dispute.⁴⁹²

Contrary to the expectations of commentators,⁴⁹³ Chad did not request a resolution urging Chad and Libya to take the dispute to the I.C.J.⁴⁹⁴ The draft resolution submitted by Chad did provide, however, for continued Security Council monitoring. The Soviet Union, espousing Libya's cause, defeated the draft resolution, and the Security Council directed the parties to settle their dispute through the O.A.U.⁴⁹⁵

Except for one incident not directly concerning the boundary dispute,⁴⁹⁶

489. 2429th Meeting, *supra* note 429, at 61 (statement of Mr. Treiki).

490. *Id.* at 38-40 (statement of Mr. Treiki); *see also* 2419th Meeting, *supra* note 536, at 22-25 (statement of Mr. Treiki).

491. 2419th Meeting, *supra* note 485, at 23-26 (statement of Mr. Treiki); 2429th Meeting, *supra* note 429, at 38-40 (statement of Mr. Treiki).

492. 2419th Meeting, *supra* note 485, at 22-23 (declaring that it was "not the purpose of this Council" to discuss legal disputes); *id.* at 26 (discussing O.A.U. attempts to resolve dispute); *see also id.* at 42-43 (statement of Mr. Salah, Jordan); *Provisional Verbatim Record of the 2428th Meeting*, U.N. SCOR, 38th Sess., 2428th mtg. at 22-25, U.N. Doc. S/PV.2428 (1983) (statement of Mr. Soglo, Benin); *id.* at 31 (statement of Mr. Al-Alfi, Democratic Yemen).

493. *See, e.g.,* Bernard D. Nossiter, *Chad Asks U.N. to Help Remove Libyan Troops from Desert Zone*, N.Y. TIMES, Mar. 18, 1983, at A3.

494. *See Draft Resolution Submitted by Chad*, U.N. SCOR, 38th Sess., Supp. for Jan.-Mar., at 96, U.N. Doc. S/15672 (1983) (requesting parties to settle dispute by peaceful means and to make use of O.A.U. machinery); *but see* 2429th Meeting, *supra* note 429, at 48-50 (statement of Mr. Barma) (expressing willingness to refer dispute to I.C.J.).

495. Bernard D. Nossiter, *U.N. Urges Libya and Chad to Take Dispute to O.A.U.*, N.Y. TIMES, Apr. 7, 1983, at A8; *Provisional Verbatim Record of the 2430th Meeting*, U.N. SCOR, 38th Sess., 2430th mtg. at 3, U.N. Doc. S/PV.2430 (1983). The decision, opposed by the United States (Security Council President Kirkpatrick promised that she would "follow the development of the situation" in her capacity as President), was consistent with past U.N. practice of deferring to regional organizations, especially the O.A.U., to settle purely regional disputes. Under this system the O.A.U. has "exclusive first jurisdiction" over such disputes. KELLEY, *supra* note 451, at 52.

The U.N. Charter grants regional agencies priority in settling regional disputes. U.N. CHARTER arts. 33, 52, ¶¶ 2-3. However, these agencies are ultimately subordinate to the Security Council. *See* U.N. CHARTER arts. 34, 36, 37. *See generally* KELLEY, *supra* note 451, at 45.

496. In the midst of stepped-up Libyan aid to the rebels and the Libyan bombing of towns in northern Chad in August 1983 (during this time, the U.S. Navy conducted exercises in the Gulf of Sirte to challenge Libya's claim that the Gulf was territorial waters, and Navy pilots shot down two Libyan aircraft), the Habré Government filed another complaint in the Security Council accusing Libya of violating its territorial integrity and interfering in its internal affairs. Again, the Security Council debated the matter without taking any action. *See Letter from the Representative of Chad to the President of the Security Council* (Aug. 2, 1983), U.N. SCOR, 38th Sess., Supp. for Jul.-Sep., at 40-41, U.N. Doc. S/15902 (1983); *Letter from the Representative of Libya to the President of the Security Council* (Aug. 2, 1983), U.N. SCOR, 38th Sess., Supp. for Jul.-Sep., at 41, U.N. Doc. S/15903 (1983); *Provisional Verbatim Record of the 2462d Meeting*, U.N. SCOR, 38th Sess., 2462d mtg., U.N. Doc. S/PV.2462 (1983); *Provisional Verbatim Record of the 2463d Meeting*, U.N. SCOR, 38th Sess., 2463d mtg., U.N. Doc. S/PV.2463 (1983); *Provisional*

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the international community made no further efforts to resolve the conflict until after Habré's summer 1987 counter-offensive dislodged the Libyan forces from all of northern Chad except the Aouzou Strip. In part this was because, from 1978 to 1982, the internal condition of Chad had attracted most of the O.A.U. attention. Chad used the boundary issue to publicize Libya's involvement in the civil war. As Habré consolidated his power after 1982, and the fighting in Chad died out, international attention to Chad also faded.

Between 1983 and 1987 sporadic fighting erupted in Chad south of the Aouzou Strip. Nevertheless, Habré's government proved the most stable since Chad's independence. However, Libyan troops remained in the Aouzou Strip, and Libya reinforced its military presence in Chad, controlling the northern forty percent of the country.⁴⁹⁷ France again intervened to stabilize the situation,⁴⁹⁸ and, in November 1984 Libya and France negotiated a mutual phased withdrawal.⁴⁹⁹ Within a week, though, France was forced to admit that Qadafi had left a sizeable force in northern Chad.⁵⁰⁰ French forces intervened again in 1986 after Libyan-backed forces struck south of the sixteenth parallel, the "red line" declared by President Mitterand.⁵⁰¹ In 1987 Habré's forces, under the command of Idris Deby and acting in concert with former rebels who had switched sides when Goukouni was again arrested in Libya,⁵⁰² scored a stunning series of victories in northern Chad, capturing large amounts of equipment and driving the Libyans from the region in a few weeks. The Chadian forces briefly dislodged the Libyans from the Aouzou Strip in August, but Libya regained the area a few weeks later, and the two countries agreed to a cease-fire.⁵⁰³

Verbatim Record of the 2465th Meeting, U.N. SCOR, 38th Sess., 2465th mtg., U.N. Doc. S/PV.2465 (1983); *Provisional Verbatim Record of the 2467th Meeting*, U.N. SCOR, 38th Sess., 2467th mtg., U.N. Doc. S/PV.2467 (1983); *Provisional Verbatim Record of the 2469th Meeting*, U.N. SCOR, 38th Sess., 2469th mtg., U.N. Doc. S/PV.2469 (1983).

497. See Alan Cowell, *Libya Said to Raid Second Town, Raising Fear of All-Out Advance*, N.Y. TIMES, Aug. 13, 1983, at A1; Leon Dash, *Chad's Leader Rejects Talks with Rebels*, WASH. POST, Aug. 17, 1983, at A14; see also ST. JOHN, *supra* note 399, at 103.

498. See WHITEMAN, *supra* note 414, at 13; William J. Foltz, *Libya's Military Power*, in THE GREEN AND THE BLACK: QADHAFI'S POLICIES IN AFRICA 52, 65 (René Lemarchand ed., 1988); Leon Dash, *Paris Names New Chad Commander*, WASH. POST, Aug. 20, 1983, at A10.

499. See WHITEMAN, *supra* note 414, at 14; Foltz, *supra* note 498, at 65; Michael Dobbs, *2 Nations Set Pullout from Chad; Disengagement by France, Libya Begins Next Week*, WASH. POST, Sept. 18, 1984, at A1; David Marsh, *French and Libyan Withdrawal from Chad Under Way*, FIN. TIMES, Sept. 26, 1984, § 1, at 5.

500. See Foltz, *supra* note 498, at 65; Richard Bernstein, *France Keeps Its Guard Up in Central Africa*, N.Y. TIMES, Feb. 23, 1986, § 4, at 3 (reporting U.S. intelligence estimates that as many as 7,000 Libyan soldiers remained in Chad).

501. WHITEMAN, *supra* note 414, at 14; Foltz, *supra* note 498, at 65.

502. See Foltz, *supra* note 498, at 65; *Libya Losing Its Grip in Chad, Officials Say*, CHI. TRIB., Jan. 11, 1987, at C5.

503. See Foltz, *supra* note 498, at 66; Lemarchand, *The Case*, *supra* note 50, at 119, 121; Paul Betts, *Chad Captures Key Border Base From Libyans*, FIN. TIMES, Aug. 10, 1987, § 1, at 2; Joan Wucher King, *Libya Claims Aouzou Recaptured*, FIN. TIMES, Aug. 29, 1987, § 1, at 3; Paul Betts, *Paris Watches Chad War Developments Closely*, FIN. TIMES, Sept. 1, 1987, § 1, at 4; Joan Wucher King, *Libya and Chad*

The dramatic events of August 1987 highlighted the boundary dispute, and the O.A.U. regained interest in settling the matter. In September Chad and Libya signed a cease-fire agreement, and the Bongo Committee agreed to create a new committee to study cartographical and other evidence bearing on the Aouzou Strip. Little was accomplished.⁵⁰⁴ In October Sudan offered to mediate the dispute; Habré, suspicious of Sudanese sympathy for Libya, rejected the offer.⁵⁰⁵

Beginning in 1988, however, mediation efforts by the O.A.U. began to bear fruit. The Bongo Committee renewed its efforts in May with a meeting in Addis Ababa.⁵⁰⁶ Qaddafi initially rejected Habré's offer to bring the matter to the I.C.J., arguing that the Aouzou Strip was "an indivisible part of the Libyan Arab land" and "never was, is not now, and never will be the subject of negotiations, international arbitration, or concessions."⁵⁰⁷ However, Libya did extend diplomatic recognition to the Habré government and professed a willingness to settle "all outstanding disputes between it and Chad."⁵⁰⁸ By October a Chadian official expressed confidence in the outcome of the negotiations, stating that the O.A.U. committee was "in charge of the Aouzou Strip issue."⁵⁰⁹ In July 1989 Habré and Qaddafi met in Bamako, Mali, holding four hours of private talks on the Aouzou Strip but failing to reach agreement. At the same time, Habré and Qaddafi met with four other African heads of state (including O.A.U. Chairman Moussa Traore of Mali) and failed to resolve the issue. Libya at this time still refused to submit the dispute to the I.C.J.⁵¹⁰

Shortly afterward, amid festivities in Libya marking the twentieth anniversary of Qaddafi's September Revolution, the Algerian government issued an official announcement stating that Libya and Chad had signed an agreement, known as the Algiers Accord, to settle the Aouzou Strip "by all political

Agree to Ceasefire in Aouzou Strip, FIN. TIMES, Sept. 12, 1987, § 1, at 3; see also WHITEMAN, *supra* note 414, at 15.

504. WHITEMAN, *supra* note 414, at 15.

505. *Chad Reportedly Rejects Sudanese Mediation on Aouzou Strip* (BBC Summary of World Broadcasts, Oct. 31, 1987), available in LEXIS, Nexis Library, Wires File.

506. *Chad Foreign Minister on OAU Meeting* (BBC Summary of World Broadcasts, Apr. 7, 1988), available in LEXIS, Nexis Library, Wires File [hereinafter *Chad Foreign Minister*].

507. *La Libye annonce qu'elle ne négociera pas à propos de la bande d'Aozou*, LE MONDE, Apr. 14, 1987, at 6; see also ST. JOHN, *supra* note 399, at 104.

508. *See Libyan Leader on OAU Anniversary: Qaddafi Says Dispute with Chad Over* (BBC Summary of World Broadcasts, May 27, 1988), available in LEXIS, Nexis Library, Wires File.

509. *Chad Envoy in Abidjan Comments on Resumption of Ties with Libya, New Priorities for Country* (BBC Summary of World Broadcasts, Oct. 6, 1988), available in LEXIS, Nexis Library, Wires File.

510. *Mali: Qadhafi and Habré Meet; Summit Ends Without Agreement*, (BBC Summary of World Broadcasts, July 24, 1989), available in LEXIS, Nexis Library, Wires File. At this point Chad's official position was that further meetings would be pointless until Libya withdrew from the Aouzou Strip. *Chad Foreign Minister on Aouzou Strip Dispute With Libya, April Coup Attempt* (BBC Summary of World Broadcasts, Aug. 12, 1989), available in LEXIS, Nexis Library, Wires File [hereinafter *Chad Foreign Minister*].

means" within one year or, failing that, to submit the dispute to the I.C.J.⁵¹¹ The agreement also committed the two states to withdraw their forces from the positions they occupied at the time of signing and to cease interfering in each other's internal affairs.⁵¹² Finally, the agreement designated the Bongo Committee to oversee the implementation of these measures.⁵¹³

By March 1990 the parties still had not reached a political solution, and Libya sought a one-year extension of the deadline at a meeting mediated by Bongo in Libreville, Gabon. Chad successfully resisted this request, and the parties later issued a communiqué stating that they had agreed to create a joint commission to demarcate the boundary and ensure implementation of the withdrawal provisions of the Algiers Accord.⁵¹⁴ However, the deadline approached without a consensus, and even last-minute efforts by King Hassan of Morocco were unsuccessful in bringing about a final resolution.⁵¹⁵ On September 1, 1990 the deadline expired, and the parties agreed to submit their dispute to the I.C.J.⁵¹⁶

In April 1989 Habré's Commander in Chief, Idris Deby, participated with two other members of the government in an unsuccessful coup attempt. Deby was apparently motivated by tribal enmity and the recent appointment of a former enemy as Foreign Minister. After the attempt, Deby fled with some troops loyal to him and eventually turned up in Sudan.⁵¹⁷ Deby invaded Chad from Sudan with Libyan-supplied equipment in November 1990 and reached N'Djamena within three weeks, inflicting heavy losses on Habré's army and driving Habré into exile in Cameroon.⁵¹⁸

511. Fundamental Agreement on the Peaceful Settlement of the Territorial Dispute, Aug. 31, 1989, Chad-Libya, arts. 1, 2, 29 I.L.M. 15, 16 (1990) [hereinafter Algiers Accord]; see also Alan Cowell, *Qaddafi's Rule is Celebrated; Libya and Chad in Peace Pact*, N.Y. TIMES, Sept. 1, 1989, at A3.

512. Algiers Accord, *supra* note 511, arts. 2, 4, 29 I.L.M. at 16-17.

513. *Id.* art. 6, 29 I.L.M. at 17.

514. *Chadian-Libyan Meeting in Gabon on Aouzou Strip Dispute* (BBC Summary of World Broadcasts, Mar. 31, 1990), available in LEXIS, Nexis Library, Wires File.

515. *Gadhafi, Habré May Settle Border Row*, WASH. TIMES, Aug. 23, 1990, at A2.

516. Libya filed a copy of the Algiers Accord with the Registry of the Court on August 31 as a notification under Article 40(1) of the Statute of the Court. The notification put to the Court the question of "the limits of [the] respective territories [of Libya and Chad] in accordance with the rules of international law applicable in the matter." Chad sent a copy of its Application to the Registry by telefax on September 1, asking the Court "to determine the course of the frontier between the Republic of Chad and the Libyan Arab Jamahiriya, in accordance with the principles and rules of international law applicable in the matter as between the Parties." On October 24 the Court met with the representatives of Chad and Libya and fixed a deadline of August 26, 1991 for the filing of each party's memorials. Territorial Dispute (Chad v. Libya), 1990 I.C.J. 149, 149-51 (Order of October 26) [hereinafter October 26 Order]. On August 26, 1991, the Court met again with the parties and set March 27, 1992 as the deadline for the filing of the Counter-Memorials. Territorial Dispute (Chad v. Libya), 1991 I.C.J. 44 (Order of August 26), available in WESTLAW, International Court of Justice Database.

517. See Michaud, *supra* note 50, at 40; *Chad Foreign Minister*, *supra* note 506.

518. See *Chad's President Flees Country*, *Says Ambassador*, Reuters Library Report, Dec. 1, 1990, available in LEXIS, Nexis Library, Wires File.

The decision to submit the dispute to the I.C.J. has stood despite the overthrow of Habré by Deby, who is considerably more pro-Libyan than Habré. Although Chad's relations with Libya immediately improved once Deby took power,⁵¹⁹ Deby does not appear to be a Libyan puppet and has vowed to continue to press for the return of the Aouzou Strip.⁵²⁰ On taking power, Deby affirmed his belief in the "integrity" of Chad's territory and expressed confidence that the I.C.J. would deliver a workable solution to the dispute.⁵²¹ Libya, too, has reiterated its commitment to refer the Aouzou Strip question to the I.C.J.⁵²²

Deby's insistence on Chadian sovereignty over the Aouzou Strip highlights the very limited success that Libya has achieved through its involvement in the rebellions and civil wars of Chad. The various protégés of Libya have not proved to be puppets. Rather, they have taken advantage of Libya's interests and wealth in order to gain power and then have snubbed Libya after succeeding. Despite large human and material costs, Libya is no closer to gaining an official Chadian recognition of its claims to the Aouzou Strip than when it occupied the region in 1973. The realization, over the course of eighteen years, that they cannot resolve the quarrel by political means prompted the parties to refer their dispute to the I.C.J. In turning to the Court, Libya and Chad have put their faith in a judicial resolution. Abstracted from the myriad political factors, the dispute may be less intractable. Nevertheless, the Court faces a complex challenge.

IV. THE OPERATIVE LEGAL PRINCIPLES IN THE AOZOU STRIP DISPUTE

The ebb and flow of various powers over the Aouzou Strip region and their tangled relations with the Toubous and with each other are a fertile source of legal arguments justifying each side's claim to the area. This part of the article discusses the legal principles upon which those arguments rely.

Each side is likely to advance claims that draw upon the legal requirements for acquiring sovereignty over territory. Chad can be expected to argue that

519. See Nicholas Kotch, *Friendship Between Chad and Old Enemy Libya Blossoms Under Deby*, Reuter Library Report, Dec. 5, 1990, available in LEXIS, Nexis Library, Wires File.

520. See Nicholas Kotch, *Ousted Chad Leader Habré Reflects on Ironies of Life*, Reuter Library Report, Dec. 3, 1990, available in LEXIS, Nexis Library, Wires File (French President Mitterand says Deby is not Qaddafi's puppet even if Libya supplied him with arms); Richard Dowden, *Chad's New Leader is "His Own Man"*, THE INDEPENDENT, Dec. 4, 1990, at 9; Kenneth B. Noble, *In Chad, Talk of a Libyan Resurgence*, N.Y. TIMES, Dec. 6, 1990, at A3.

521. *Idriss Deby on Recent Events in Chad; Chad-Libyan Relations; Other Issues* (BBC Summary of World Broadcasts, Dec. 12, 1990), available in LEXIS, Nexis Library, Wires File; *Chad: Deby Denies Relations with Libya Harmed by POWs Issue* (BBC Summary of World Broadcasts, Dec. 24, 1990), available in LEXIS, Nexis Library, Wires File; *Chad Minister on Relations With Libya; Deby to Paris* (BBC Summary of World Broadcasts, Feb. 12, 1991), available in LEXIS, Nexis Library, Wires File.

522. *Chadian Government Blames Libya and Sudan for Attack; Libya Denies Involvement* (BBC Summary of World Broadcasts, Nov. 12, 1990), available in LEXIS, Nexis Library, Wires File.

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France occupied the Aouzou Strip, acquiring the area in accordance with the principles of international law. Libya may respond that the territory could not be acquired by occupation since it was under the sovereignty of the Toubous. Alternatively, Libya may argue that Turkey or the Sanusi exercised sovereignty over the area, either by occupation or as a hinterland of Tripolitania. Chad can be expected to deny these assertions, and it could plead that even if the area was not open to occupation by France, France nonetheless acquired valid title by occupying the region after Turkey abandoned it.

Evaluating such claims requires an understanding of the law governing the acquisition of territory. Section A of this Part examines occupation as a method of gaining title, focusing on the acts a state needed to perform in order to perfect title by occupation. It also analyzes a crucial question left unsettled by the international law of the colonial period: whether indigenous tribes not recognized as states possessed rights of sovereignty over the territory they inhabited. It then considers other methods states used to reserve territory for themselves: the sphere of influence, the hinterland, and the "colonial protectorate." Sections B, C, D, and E discuss other methods for acquiring or losing title to territory, including prescription, conquest, cession, and abandonment.

Libya may also urge the I.C.J., in evaluating arguments of Sanusi or Turkish sovereignty over the Aouzou Strip area, not to apply the traditional Western criteria of sovereignty, which developed in a geographical, social, and political milieu far different from that of the Sahara. Using this argument, Libya may request the Court to apply criteria that developed in North Africa. These standards, which respond to the enormous distances and the necessity of nomadic migration, perceive sovereignty as fundamentally personal—arising from relations of allegiance—rather than territorial. The Islamic theory of the state, where temporal and spiritual power reside in one leader who commands the allegiance of all Muslims, is, under this argument, the political structure that was best adapted to this milieu. Section F explores the Islamic principles of sovereignty and analyzes a previous attempt (ultimately unsuccessful) to convince the I.C.J. to apply them in a North African territorial dispute.

Both Chad and Libya claim title to the Aouzou Strip derivatively. Chad claims title as the successor of France; Libya could claim title as the successor of either Turkey or the Sanusiya. An understanding of the principles of state succession, provided in Section G, is essential in order to appraise these claims. Chad will likely support its claim to the territory by invoking the principle of *uti possidetis*, which holds that colonies, upon acceding to statehood, inherit the boundaries of the former colony. Libya may counter by urging the I.C.J. to apply the norm of decolonization, which rejects *uti possidetis* and seeks to return territories and peoples to the political status quo that existed prior to colonization. Sections H and I discuss the law underlying these arguments.

Both Chad and Libya can also be expected to rely on treaties to support their versions of the boundary. As it has in the past, Chad will likely invoke the 1955 Treaty of Friendship between France and Libya, which defined the boundary by reference to lines drawn in agreements from the colonial period. Libya can be expected to attack this agreement as a coercive product of grossly unequal bargaining power between France, a militarily and economically powerful imperial state, and Libya, an impoverished and weak former colony dependent on Western aid. Libya may also invoke the 1935 Mussolini-Laval Accords, in which France agreed to cede the Aouzou Strip to Italy. Chad will undoubtedly argue that this treaty lacks effect because it was never ratified and because Italy later denounced the agreement without trying to take possession of the territory. Sorting out these claims requires an understanding of the relevant principles of the law of treaties. Section J introduces these principles, beginning with a discussion of the law of coercion in treaty formation. It also considers the role of ratification in the entry of treaties into force.

The Aouzou Strip dispute implicates two legal meta-issues concerning the choice of a relevant body of law to apply. The first, mentioned above, arises from a cultural gulf, pitting Western against Islamic legal principles. Its resolution will necessarily move the Court into relatively uncharted territory. The second meta-issue arises from a temporal gulf: after the passage of so much time, which period's legal norms and requirements will govern the dispute? Here, the legal territory is much more familiar. Under the so-called intertemporal law, enunciated in the classic statement by the Swiss jurist Max Huber in the 1928 *Island of Palmas* arbitration, "[a] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."⁵²³ Under the intertemporal law, an act that was sufficient to confer title at the time it was performed will establish title even if the law subsequently changes and the act is no longer sufficient under the new law. The practical effect of this rule is to freeze title as soon as it crystallizes.

However, the *Island of Palmas* award stated that where the act required to confer title imposes a continuing obligation, the fulfillment of that obligation by the state is evaluated according to the current law at each stage:

[A] distinction must be made between the creation of rights and the existence of rights. The same principle which subjects [sic] the act creative of a right to the law in force at the time when the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of the law.⁵²⁴

523. *Island of Palmas Case* (U.S. v. Neth.), 2 R.I.A.A. 829, 845 (Huber, Arb., Apr. 1928). In the *Western Sahara* case, the I.C.J. applied the intertemporal law to the question whether Western Sahara was a *terra nullius* at the time of colonization by Spain. See *Western Sahara*, 1975 I.C.J. 12, 38-39 (Oct. 16).

524. 2 R.I.A.A. at 845.

Thus, if the principle of "effective occupation" governed the acquisition of sovereignty over territory at the time a state first took possession of a territory, the state's title to that territory thereafter would depend on its adherence to the evolving principles of international law, at least to the extent that occupation involved continuing obligations.

The intertemporal law had been espoused by international legal scholars before the *Island of Palmas* case. In 1904 John Westlake wrote that "[t]itles must be judged by the state of international law at the time when, if at all, they arose."⁵²⁵ And in 1925, shortly before the *Island of Palmas* award, Paul Fauchille also enunciated the principle, reasoning that a state cannot be held to comply with requirements which international law does not yet impose.⁵²⁶ Thus, the principle was generally recognized at the time when France, Turkey, and the Sanusiya were all seeking to expand into Borku, Ennedi, and Tibesti. Accordingly, the analysis now turns to an examination of the relevant law concerning the acquisition of territorial sovereignty during that time.

A. The Law of Occupation

The subject of occupation as a means of acquiring territory attracted a great deal of scholarly attention during the colonial era. Publicists unanimously agreed that occupation was a valid—in fact, desirable⁵²⁷—means of acquiring territory if it was performed in accordance with the conditions prescribed by international law. However, they disagreed substantially as to the content of those conditions.

This section explores the legal norms that governed the acquisition of territory by occupation during the late nineteenth and early twentieth centuries. The discussion begins by tracing the basic requirements of occupation under customary international law: the simultaneous display, over a sufficient period, of both the intention and the ability to exercise effective control over the area. It then reviews various attempts during this period to set out these requirements

525. 1 JOHN WESTLAKE, *INTERNATIONAL LAW* 112 (1904) [hereinafter WESTLAKE, *INTERNATIONAL LAW*].

526. 1 PAUL FAUCHILLE, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC* (pt. 2) 745-46 (1925).

527. Publicists justified occupation as a means of putting unutilized or underutilized resources to a higher use. Raoul Genêt, *Notes sur l'acquisition par occupation et le Droit des Gens traditionnel*, 15 *REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE* 285, 291-92 (3d ser. 1934); see also 1 FAUCHILLE, *supra* note 526, at 681-84 ("it is in the general interest that a thing not remain unused: he who occupies it truly renders a service to all mankind"). These ideas had been current at least since Vattel, who held that a people could not rightfully occupy more territory than it needed or could use. See GASTON JÈZE, *ÉTUDE THÉORIQUE ET PRATIQUE SUR L'OCCUPATION* 108-09, 108 n.1, 109 n.2, 111 (Paris, V. Giard & E. Brière 1896); CHARLES SALOMON, *L'OCCUPATION DES TERRITOIRES SANS MAÎTRE* 202-03 (Paris, A. Giard 1889). Occupation was also preferable to rival bases for title, such as priority of discovery, since its greater visibility and precision reduced the possibility of conflict. André Decencière-Ferrandière, *Essai historique et critique sur l'occupation comme mode d'acquérir les territoires en droit international*, 18 *REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE* 362, 379 (1937).

in positive international law. The discussion next turns to one issue that divided contemporary jurists: whether "savage" tribes not formally recognized as states had a right of sovereignty over the territory they inhabited. The discussion then considers the extent of territory a state could claim through occupation. In particular, it examines various hinterland theories, such as proximity or contiguity, advanced by states to lay claim to more territory than they effectively occupied. This section then concludes with an analysis of two theories used to circumvent the requirement of effective occupation: the spheres of influence and the colonial protectorate.

1. *The Confluence of Animus Domini and Corpus: Intention and Ability to Exercise Effective Control Over Territory*

Scholars of the nineteenth and early twentieth centuries generally agreed that occupation required both an intention to occupy (the *animus domini* or *animus possidendi*) and a physical manifestation of that intention (the *corpus* or *apprehensio*). According to William Edward Hall, a state could obtain valid title to a territory when it performed an act "which amounts to an actual taking of possession, and at the same time indicate[d] an intention to keep the territory seized." The intention to acquire, coupled with the fact of possession, was a "sufficient ground of proprietary right."⁵²⁸ In 1933 the Permanent Court of International Justice (P.C.I.J.), in the *Eastern Greenland* case, gave what has come to be regarded as the classic formulation of this requirement: "a claim to sovereignty based . . . upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign and some actual exercise or display of such authority."⁵²⁹

The *animus domini* required the "intention . . . to exercise over the territory the rights attached to sovereignty, in particular the rights of administration, jurisdiction, etc."⁵³⁰ Therefore, since only a state could exercise sover-

528. WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 106-07 (4th ed. 1895); see also HENRY BONFILS, MANUEL DE DROIT INTERNATIONAL PUBLIC 303 (Paul Fauchille ed., 3d ed. 1901); JÈZE, *supra* note 527, at 227; M.F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 284 (1926); 1 L. OPPENHEIM, INTERNATIONAL LAW 276-77 (1905); cf. T.J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 147 (Boston, D.C. Heath & Co. 1895) [hereinafter LAWRENCE]; T.J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 152 (4th ed. 1910) [hereinafter LAWRENCE 4th] (occupation requires annexation, which signals intention to occupy, and settlement, the physical taking of possession).

529. Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 45-46 (Apr. 5). A precedent for this statement may be found in the *Walfisch Bay* case, where the arbitrator stated that "the evidence of a wish to acquire, and of an effective occupation," would suffice to establish sovereignty. Southern Boundary of the Territory of Walfisch Bay (Gr. Brit. v. Ger.), 104 Brit. & Foreign St. Pap. 50, 101-02 (May 23, 1911).

530. JÈZE, *supra* note 527, at 175.

eighty, the demonstration of *animus domini* had to be the act of a state.⁵³¹ Some contemporary publicists held that a sufficient manifestation of the *animus domini* was the erection of a post, the raising of a flag, or the public reading of an official proclamation claiming the territory in the name of the sovereign.⁵³² In general, any act demonstrating an intention to exercise sovereignty—even the very act of claiming the territory—satisfied the *animus* requirement.⁵³³

The second element necessary to create title by occupation, the *corpus*, required effective or real occupation.⁵³⁴ According to the *Island of Palmas* award, "[t]his demonstration consists in the actual display of state activities, such as belongs only to the territorial sovereign."⁵³⁵ "[W]hat is essential in such a case is the continuous and peaceful display of actual power in the . . . region."⁵³⁶

The Aouzou Strip dispute raises issues whose resolution will depend on the meaning ascribed to "continuous and peaceful display of power." Libya can be expected to argue that either the Sanusi or the Ottoman presence in Tibesti, Borku, or Ennedi constituted occupation within the meaning of this phrase. Chad will likely argue that they did not, but that the activities of French forces in the region were sufficient to establish a valid title by occupation. To evaluate these conflicting arguments, the inquiry must turn to the

531. LINDLEY, *supra* note 528, at 284; see also JÈZE, *supra* note 527, at 176-77. Theoretically, any state, regardless of its degree of civilization or independence, could occupy territory. *Id.* at 209-13; see also SALOMON, *supra* note 527, at 121-25. A taking of possession by a private individual without a commission from his government did not suffice to establish the *animus domini* unless his state subsequently ratified the act. LINDLEY, *supra* note 528, at 287.

532. See, e.g., LAWRENCE, *supra* note 528, at 147; LAWRENCE 4th, *supra* note 528, at 152; 1 OPPENHEIM, *supra* note 528, at 276-77. Whereas the flag or post was clearly meant to be a visible sign of the occupying state's intention to representatives of other states who arrived in the future, it is difficult to see how the public reading of a proclamation, in a land that was ostensibly uninhabited or sparsely inhabited, could provide to future explorers any permanent evidence of such intention. Most likely the requirement of such physical manifestations of the sovereign's *animus domini* persisted simply as a vestige of the former doctrine, under which discovery coupled with constructive occupation, such as the erection of a monument or the raising of a flag, was sufficient to confer title without real occupation of the territory.

533. See *Eastern Greenland*, 1933 P.C.I.J. (ser. A/B) No. 53, at 48.

534. During the fifteenth and sixteenth centuries, when Europeans were discovering vast lands but possessed relatively meager means to exploit and govern any but a small portion of those lands, priority of discovery sufficed to confer a valid title to territory. However, as the amount of unappropriated land grew smaller and the means of putting it into use and governing it improved, the law adapted to require a greater showing of ability to control territory: the occupying power had to be really present there. See *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 83-84 (Apr. 5) (dissenting opinion of Judge Anzilotti); see also 1 FAUCHILLE, *supra* note 526, at 688-89; 2 PASQUALE FIORE, *NOUVEAU DROIT INTERNATIONAL PUBLIC SUIVANT LES BESOINS DE LA CIVILISATION MODERNE* 146-47 (Charles Antoine trans., 2d ed. 1885); SALOMON, *supra* note 527, at 82-83.

535. *Island of Palmas Case* (U.S. v. Neth.), 2 R.I.A.A. 829, 839 (Huber, Arb., Apr. 1928).

536. *Id.* at 857. In the *Clipperton Island* case, the arbitrator stated that Mexico, which claimed a title derived from Spain, would have to prove that Spain "had effectively exercised [its] right" to incorporate the island into its possessions. *Difference Relative to the Sovereignty Over Clipperton Island* (Mex. v. Fr.) (King Victor Emmanuel III of Italy, Arb., 1931), 26 AM. J. INT'L L. 390, 393 (1932).

publicists and to international case law to clarify the rather nebulous meaning of this standard.

The Argentinean jurist Charles Calvo stated that an occupation, to be effective, "must be accompanied or followed by the commencement of administrative organization or of commercial or industrial exploitation in the country."⁵³⁷ For others commentators, the test was the ability to exclude competing states.⁵³⁸ M.F. Lindley argued that the essential criterion was the occupying state's ability to maintain order and security in the territory.⁵³⁹ This test proved to be the most widely accepted, and was usually phrased as requiring "a local administration sufficient to assure the regular exercise of its authority."⁵⁴⁰

This test was essentially practical, as it required consideration of whether the occupying power possessed the means to assure the unhindered development of the territory. This standard was consistent with the ostensible aim of the colonial system: bringing previously unexploited land and resources into the global economy. If the state was unable to maintain order in the territory and thus unable to protect the investments made and the enterprises operating there, then the state had no right to claim the territory to the exclusion of others.⁵⁴¹

537. 1 CHARLES CALVO, *LE DROIT INTERNATIONAL THÉORIQUE ET PRATIQUE* 389 (Paris, Librairie nouvelle de Droit et de Jurisprudence 1896).

538. SALOMON, *supra* note 527, at 310-11.

539. LINDLEY, *supra* note 528, at 141 ("There is now a general agreement that the essential point to look to is not whether there is present sufficient force to repel foreign intrusion, or whether the land is in fact being effectively exploited, but whether there has been established over it a sufficient governmental control to afford security to life and property there.").

540. See, e.g., BONFILS, *supra* note 528, at 309; AMOS S. HERSHEY, *THE ESSENTIALS OF PUBLIC INTERNATIONAL LAW* 186 (1912); see also *Difference Relative to the Sovereignty Over Clipperton Island* (Mex. v. Fr.) (1931), 26 AM. J. INT'L L. 390, 394 (1932) (occupying state must establish "an organization capable of making its laws respected"); cf. *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 83 (Apr. 5) (dissenting opinion of Judge Anzilotti) (noting "disproportion between the claim to sovereignty over all Greenland and the effective exercise of that authority;" while Denmark may have passed laws ostensibly applying to non-colonized as well as colonized parts of Greenland, "there were perhaps laws in force but no authority to enforce them" in non-settled parts).

This requirement remained the law throughout the colonial period. In 1945 Norman Hill wrote that occupation required "the establishment of governmental control sufficient to provide security to life and property." NORMAN HILL, *CLAIMS TO TERRITORY IN INTERNATIONAL LAW AND RELATIONS* 147 (1945).

541. Another way of stating the effectiveness requirement was to phrase it in terms of the obligations that occupation imposed on the acquiring state. Essentially, these obligations simply mirrored the conditions for effectiveness described above. For example, the *Island of Palmas* arbitral award stated that territorial sovereignty brings with it an obligation to protect the rights of other states and their nationals. *Island of Palmas Case* (U.S. v. Neth.), 2 R.I.A.A. 829, 839 (Huber, Arb., Apr. 1928); see also SALOMON, *supra* note 527, at 331-37 (occupying state assumes obligation to assure existence of sufficient authority and to respect rights acquired by foreign governments and nationals, nationals of occupying state, and natives). This is essentially the same as the requirement that the occupant maintain order in the territory. Westlake advanced a similar but more specific view: the occupation was not effective until the occupant established a sufficient authority to protect the natives and to guarantee the enjoyment of "civil rights essential to European or American life." JOHN WESTLAKE, *THE COLLECTED PAPERS OF JOHN WESTLAKE ON PUBLIC INTERNATIONAL LAW* 162 (L. Oppenheim ed., 1914) [hereinafter WESTLAKE, *COLLECTED PAPERS*]; 1 WESTLAKE, *INTERNATIONAL LAW*, *supra* note 525, at 107. Westlake's view reflects his conception of native

In practice, however, the international system could not effectively police these requirements. Logistically, states were simply unable to know what was occurring in the territory of others, frequently leaving the occupying state as the sole judge of its actions. As a result, state practice did not always conform to the standards put forth by the jurists.⁵⁴²

International law imposed less stringent requirements on the occupying state in the case of isolated or desolate areas. As Max Huber recognized in *Island of Palmas*, "the manifestations of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent."⁵⁴³ In these cases the law imposed a lesser obligation, requiring acts that were closer to the symbolic acts that the law of previous centuries had required to create a constructive occupation. This flexible test essentially tailored the effectiveness requirement to the exigencies and realities of each particular situation.⁵⁴⁴

sovereignty. Essentially, Westlake held that Europeans were not obliged to recognize the sovereignty of native tribes unless the tribes possessed a "civilized" government—that is, one structured along European lines, or in the end, one capable of keeping Europeans out by force. See *infra* notes 584-584 and accompanying text.

542. SALOMON, *supra* note 527, at 366-67.

543. *Island of Palmas Case* (U.S. v. Neth.), 2 R.I.A.A. 829, 867 (Huber, Arb., April 1928); JÈZE, *supra* note 527, at 237; see also LINDLEY, *supra* note 528, at 159; SALOMON, *supra* note 527, at 317-19; GENÈT, *supra* note 527, at 441. Again, the classic statement of the law in this regard appears in the *Island of Palmas* award:

[I]n the exercise of territorial sovereignty there are necessarily gaps, intermittence in time and discontinuity in space. This phenomenon will be particularly noticeable in the case of colonial territories, partly uninhabited or as yet partly unsubdued. The fact that a State cannot prove display of sovereignty as regards such a portion of territory cannot forthwith be interpreted as showing that sovereignty is inexistent. Each case must be appreciated in accordance with the particular circumstances.

2 R.I.A.A. at 855; see also *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 46 (Apr. 5) (noting that tribunals have "been satisfied with very little in the way of actual exercise of sovereign rights . . . particularly . . . in the case of claims to sovereignty over areas in thinly populated or unsettled countries"); *Difference Relative to the Sovereignty Over Clipperton Island* (Mex. v. Fr.) (King Victor Emmanuel III of Italy, Arb., 1931), 26 AM. J. INT'L L. 390, 394 (1932) (stating that it is "unnecessary to have recourse" to effective occupation "if a territory, by virtue of the fact that it was completely uninhabited, is, from the moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state").

Although such statements certainly embodied the view of the majority of scholars at the time, they did not receive unanimous assent. For those writers who insisted that the true mark of effective occupation was the ability to exclude other states, a lesser presence would not suffice. Regardless of the nature of the territory and the people who inhabited it, a state had to maintain "local power sufficient to permit it to exercise its exclusive authority." 1 FAUCHILLE, *supra* note 526, at 715. The recognition that the occupation of sparsely populated or desolate areas imposed a lesser obligation lent support to claims that states occupying an area could also claim its hinterland. See *infra* notes 623-651 and accompanying text.

544. See Robert D. Hayton, *The Nations and Antarctica*, 10 ÖSTERREICHISCHES ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 368, 392-93 (1960); see also HILL, *supra* note 540, at 149-151; LINDLEY, *supra* note 528, at 158 (in "uninhabited lands which are not suitable for settlement," the occupying state need only establish "any organization (however rudimentary) or . . . any system of control, which, *having regard to the conditions under which the area appropriated was being used or was likely to be used*, was reasonably sufficient to maintain order among such persons as might resort there") (emphasis added); GENÈT, *supra* note 527, at 441-42. One scholar has suggested that "such factors as the broad features of the territory, the length of time during which state authority has been displayed, the presence or absence of adverse claims, and the attitude of third states are relevant" in assessing effectiveness. SURYA P. SHARMA,

International tribunals deciding boundary disputes have supplied some examples of the type of acts a state must perform to have its occupation recognized as effective. The cases have mostly concerned relatively isolated, small, or sparsely populated regions. In these cases, tribunals have been willing to recognize the performance of relatively routine and mundane government functions as a sufficient demonstration of state authority.⁵⁴⁵ Such functions include the punishment of an illegal act and the arrest of an offender;⁵⁴⁶ the granting of concessions;⁵⁴⁷ the passage of legislation relating to the territory;⁵⁴⁸ the dispatch of scientific and hunting expeditions;⁵⁴⁹ and the issuance of permits to persons visiting the area.⁵⁵⁰ Where the disputed territory was a group of small islets lying off the coast of one of the state's national territory, even lesser acts have sufficed: the assessment of property taxes; the holding of inquests; the licensing of boats; the establishment of a customs house; and the completion of various construction projects.⁵⁵¹

These precedents have ambiguous value for resolving the Aouzou Strip dispute. On one hand, the cases cited involved territory much like Tibesti, Borku, or Ennedi—sparsely populated and not very easily accessible. This similarity would argue for assigning some precedential value to these decisions. On the other hand, these cases involved land with populations that were generally passive, or with no population at all. A much greater display of state authority might be required to demonstrate effective control over an area inhabited by a people as hostile and anarchic as the Toubous.

Once a state had maintained the *animus* and *corpus* for a period sufficient to prove its control over the territory, international law imposed no further conditions on it. In particular, the law did not require that other states recognize the occupation to make it valid.⁵⁵² In 1885 the Conference of Berlin, which had been convened to regulate the acquisition of territory on the African coasts, rejected a proposal that would have made the recognition by other

INTERNATIONAL BOUNDARY DISPUTES AND INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 94 (1976).

545. See SHARMA, *supra* note 544, at 176.

546. Southern Boundary of the Territory of Walfisch Bay (Gr. Brit. v. Ger.), 104 Brit. & Foreign St. Pap. 50, 100 (May 23, 1911).

547. Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 48 (Apr. 5); see also *Walfisch Bay*, 104 Brit. & Foreign St. Pap. at 100.

548. *Eastern Greenland*, 1933 P.C.I.J. (ser. A/B) No. 53, at 62.

549. *Id.* at 62-63.

550. *Id.* at 63.

551. *Minquiers and Ecrehos* (Fr. v. U.K.), 1953 I.C.J. 47, 65-66, 69 (Nov. 17).

552. JÈZE, *supra* note 527, at 298.

states of the effectiveness of an occupation a condition of its validity.⁵⁵³ The legitimacy of an occupation depended solely on its realization.⁵⁵⁴

2. Codification of the Requirement of Effective Occupation

The law of occupation did not spring solely from the writings of eminent jurists and from arbitrations and cases decided after the fact. In 1885 and 1919 European states entered into two agreements among themselves governing the requirements of effective occupation. In 1888, the leading scholars of international law, under the aegis of the Institut de Droit International, issued a declaration on the principles of occupation. These attempts to codify the law of occupation point to the emergence and acceptance, at least in theory, of an international norm on the subject.

a. *The Final Act of the Conference of Berlin, 1885*

At the end of 1884 representatives of Europe's major powers, as well as Turkey and the United States, convened the Conference of Berlin to decide the status of the Congo and to set down rules for the future acquisition of territory in Africa. The final act of the conference (the Berlin Act),⁵⁵⁵ issued in February 1885, fixed two important rules for the occupation of territory. First, the occupation had to be effective, and second, the occupying state had to notify other powers of the occupation.

Article 35 of the Berlin Act set out the requirement of effective occupation. Each signatory recognized "the obligation to assure, in the territories occupied by [it], on the coasts of the African continent, the existence of an authority sufficient to assure respect for acquired rights and, if necessary, freedom of commerce and movement."⁵⁵⁶ Under Article 34, the signatories pledged to

553. Report of the Commission charged with Examination of the Project of Declaration Respecting the New Occupations on the Coasts of Africa, in *THE SCRAMBLE FOR AFRICA* 245-51 (R.J. Gavin & J.A. Betley eds. & trans., 1973) [hereinafter *SCRAMBLE*].

554. Genêt, *supra* note 527, at 440.

555. General Act of the Conference of Berlin, Feb. 26, 1885, art. 35, 165 Consol. T.S. 485, 501 [hereinafter *Berlin Act*].

556. *Id.* According to some authors, "acquired rights" included rights acquired by the indigenous population. Frantz Despagne, *Les occupations des territoires et le procédé de l'hinterland*, 1 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 103, 105 (1894). These rights probably were limited to private rights—for instance, land ownership.

The final version of Article 35 imposed less stringent conditions than Germany had originally proposed. Whereas the initial draft required states to "establish and maintain" authority, Article 35 as adopted required them to "assure the existence" of authority. This language permitted states to adopt native institutions of governance. In addition, recognizing the difficulty of assuring peace during the first stages of an occupation, the delegates changed the draft to prevent other states from seizing upon this difficulty in order to challenge the validity of the occupation. Whereas the original draft imposed an obligation to assure peace, the final version imposed a lesser obligation to assure order. See LINDLEY, *supra* note 528, at 146-47; see also JÈZE, *supra* note 527, at 262-63; SALOMON, *supra* note 527, at 333.

give each other notice of any future occupation or the establishment of any protectorate on the African coasts, so that other states could make whatever protests or claims they might have to the same territory.⁵⁵⁷ Whereas the notification requirement extended to protectorates, the provisions of Article 35 applied by their terms only to "territories occupied" by the signatories and not to protectorates.⁵⁵⁸

However, the juridical status of these two requirements was uncertain. By its terms the scope of the Berlin Act was limited in three respects: 1) it applied only to future occupations; 2) it applied only to the coasts, and not the interior, of Africa;⁵⁵⁹ and 3) it applied only in the reciprocal relations of the signatory states.⁵⁶⁰ The arbitrator in the *Clipperton Island* case, noting these three restrictions, refused to apply the Berlin Act to the dispute before him.⁵⁶¹ However, almost all commentators argued that the Berlin Act had, in reality, much wider application, because its terms represented an emerging consensus as to all occupations regardless of location and the parties involved.⁵⁶² Fur-

557. Berlin Act, *supra* note 555, art. 34, 165 Consol. T.S. at 501. Commentators hailed notification as a means of preventing disputes and providing for the orderly allocation of territory. See JÈZE, *supra* note 527, at 272-73; SALOMON, *supra* note 527, at 291-92; Decencière-Ferrandière, *supra* note 527, at 632.

558. Although Bismarck submitted an initial draft of the Berlin Act that required protectorates and occupations to fulfill identical conditions, the delegates at the Conference dropped the effectiveness requirement for occupations at the insistence of Great Britain. Telegram from Sir Edward Malet to Lord Granville (Feb. 21, 1885), in SCRAMBLE, *supra* note 553, at 114; see also S.E. CROWE, THE BERLIN WEST AFRICAN CONFERENCE, 1884-1885, at 177-81 (1942).

559. Great Britain feared that vague requirements for occupations of the African interior might allow states with coastal possessions to encroach inland on its interior territories. As a result, Great Britain inquired whether the rules of Articles 34 and 35 might apply to the interior as well as the coasts. Germany and France defeated this proposal. CROWE, *supra* note 558, at 181-82; SALOMON, *supra* note 527, at 263. Their resistance might have arisen from the fact that the interior was still largely unexplored by Europeans, and from the difficulty of establishing an effective occupation there. See MALCOLM SHAW, TITLE TO TERRITORY IN AFRICA: INTERNATIONAL LEGAL ISSUES 49 (1986). As a result of these considerations, colonial states used other devices that did not require effective occupation, such as theories of proximity and the delimitation by treaty of spheres of influence, to lay claim to interior lands in Africa. *Id.*; see also *infra* notes 623-661 and accompanying text.

560. 1 FAUCHILLE, *supra* note 526, at 689-90; see also BONFILS, *supra* note 528, at 303; 1 CALVO, *supra* note 537, at 401; JÈZE, *supra* note 527, at 30-34; SALOMON, *supra* note 527, at 262; Decencière-Ferrandière, *supra* note 527, at 636-38.

561. 26 AM. J. INT'L L. at 394. The arbitrator also stated that Article 35 "imposes an obligation which presupposes an occupation which has already taken place and is already valid." *Id.* Under this view, Article 35 imposes continuing duties on occupying states but has nothing to do with the initial taking of possession. Such a view seems contrary to the intentions of the nations who convened at Berlin. It can be reconciled with those intentions only by taking account of the general recognition among states that no occupation could be completely effective from the start, i.e., at the initial taking of possession.

562. See Despagnet, *supra* note 556, at 106 ("[I]t is beyond doubt that the rules of the Act of Berlin are the *minimal* expression of international legal theory at present."); see also JÈZE, *supra* note 527, at 35; LINDLEY, *supra* note 528, at 145-46; 1 WESTLAKE, INTERNATIONAL LAW, *supra* note 525, at 105. Some commentators argued for the universal application of these rules but conceded that they had not yet become part of the general law of nations. SALOMON, *supra* note 527, at 272.

Arguments supporting universal application of the principles of the Berlin Act received a boost in 1888, when the Institut de Droit International adopted a declaration embodying substantially the same principles as the Berlin Act. See *infra* notes 569-574 and accompanying text. Other jurists pointed out that the application of the principles of the Berlin Act in places other than on the African coasts demonstrated

thermore, the principle of effective occupation antedated the Berlin Act, not only in the writings of jurists but also in international arbitrations.⁵⁶³ Later scholars looking back on the period following the Berlin Act concluded that, *Clipperton Island* notwithstanding, states had in fact accepted the principles of the Berlin Act as an expression of contemporary customary international law.⁵⁶⁴

The arguments favoring universal application of the Berlin Act undoubtedly correctly expressed the state of international law at the time, at least with respect to the requirement of effective occupation. However, the notification requirement had just been instituted,⁵⁶⁵ and international law did not require its universal application. Although some states moved to make notification of new acquisitions of territory a standard part of their practice,⁵⁶⁶ they constituted a minority. Even the most vigorous advocates of applying the Berlin Act universally conceded that international law probably did not require notification anywhere except on the coasts of Africa.⁵⁶⁷ The arbitrator in the *Island of Palmas* case took this view.⁵⁶⁸

b. *The Declaration of the Institut de Droit International, 1888*

Some scholars felt that the Berlin Act had left notable gaps in certain areas and set out to fill those gaps. These efforts came to fruition in the adoption by the Institut de Droit International of a resolution on occupation in 1888 (the I.D.I. Declaration).⁵⁶⁹

that states accepted Articles 34 and 35 as "the expression of customary international law." 1 FAUCHILLE, *supra* note 526, at 690.

Lindley argued that the rules of the Berlin Act were general rules of international law, and that only the limited purposes of the Conference of Berlin prevented the delegates from announcing a broader application of the rules. LINDLEY, *supra* note 528, at 145. In the 1885 *Caroline Islands* arbitration between Germany and Spain, for example, Pope Leo XIII as arbitrator applied the principles of the Berlin Act to Pacific islands by inviting Spain to make its occupation of the islands more effective. *See* Genêt, *supra* note 527, at 419-20; *see also* 1 CALVO, *supra* note 537, at 402-03.

One notable exception was Hall, who drew a distinction between the Berlin Act and the principles of customary international law. According to Hall, only the latter applied in the interior of Africa. HALL, *supra* note 528, at 120.

563. In the *Delagoa Bay* arbitration between Great Britain and Portugal, Marshal MacMahon, the President of France, denied Great Britain's claim based on treaties concluded with the natives during a temporary interruption of Portugal's occupation of the area, and awarded title to Portugal based on its occupation of the area before and after the British appearance. *See* Genêt, *supra* note 527, at 417-19; *see also* LINDLEY, *supra* note 528, at 135-36.

564. Genêt, *supra* note 527, at 313.

565. LINDLEY, *supra* note 528, at 294; SALOMON, *supra* note 527, at 273.

566. For example, Germany and Great Britain agreed in 1890 to notify each other of any treaties they concluded with Central African chiefs. 1 FAUCHILLE, *supra* note 526, at 690; *see also* LINDLEY, *supra* note 528, at 294.

567. LINDLEY, *supra* note 528, at 295; *see also* BONFILS, *supra* note 528, at 310-11.

568. *Island of Palmas Case (U.S. v. Neth.)*, 2 R.I.A.A. 829, 868 (Huber, Arb., Apr. 1928).

569. *Projet de déclaration internationale relative aux occupations de territoires* [hereinafter I.D.I. Declaration], *adopted in Examen de la théorie de la conférence de Berlin sur l'occupation des territoires*,

Article I of the I.D.I. Declaration set forth the conditions for the validity of an occupation:

The occupation of a territory by title of sovereignty can be recognized as effective only if it combines the following conditions:

1. The taking of possession of a territory enclosed within certain limits, done in the name of the government;

2. Official notification of the taking of possession.

The taking of possession is accomplished by the establishment of a responsible local power, provided with sufficient means to maintain order and to assure the regular exercise of its authority within the limits of the occupied territory. These means can be lent to the existing institutions in the occupied country.

Notification of the taking of possession is done either by publication in the form that, in each State, is in use for notification of official acts, or by diplomatic means. It shall contain the approximate determination of the boundaries of the occupied territory.⁵⁷⁰

Article I represented a modification of a draft proposal submitted by Édouard Engelhardt, which emphasized the need to establish local power, in contrast to a competing draft submitted by F. de Martitz, which required only the taking of possession and notification.⁵⁷¹ The adoption of Engelhardt's proposal over that of de Martitz effectively precluded the possibility of title arising from symbolic acts or constructive occupation. Article II of the I.D.I. Declaration applied the same rules to protectorates.⁵⁷²

Scholars perceived the I.D.I. Declaration as a summary of enlightened opinion at the time of its adoption.⁵⁷³ The applicability of the I.D.I. Declaration is, however, limited in two respects. First, although the members of the Institut agreed on the conditions required to make an occupation effective, they were unable to agree on a definition of the land that was subject to occupation—that is, territory that was *terra nullius* (i.e. land belonging to no one). In particular, the members disagreed as to whether savage tribes had a recognized right of sovereignty that would remove their land from the domain of *terra nullius*.⁵⁷⁴ Second, unlike the Berlin Act, the I.D.I. Declaration was the product not of negotiation among states but rather of the deliberation of scholars. Many publicists maintained, in a strict positivist stance, that although

10 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 173, 201-04 (1888-1889) [hereinafter *Examen*].

570. *Id.* art. I; see also HYDE, *supra* note 618, at 172.

571. *Examen*, *supra* note 569, at 187; see also *id.* at 182 (comments of G. Rolin-Jaequemyns, Secretary General).

For copies of the original drafts by Engelhardt and de Martitz, see Édouard Engelhardt, *Étude sur la déclaration de la Conférence de Berlin relative aux occupations*, 18 REVUE DE DROIT INTERNATIONAL (pt. 2) 573, 582-86 (1886); de Martitz, *Occupation des territoires*, 19 REVUE DE DROIT INTERNATIONAL 371, 373-76 (1887).

Article IV of de Martitz's proposal also required the establishment of a sufficient local power, but the members of the Institut felt that the proposal did not place enough emphasis on this point. De Martitz, *supra*, at 374-75; *Examen*, *supra*, at 187.

572. I.D.I. Declaration, *supra* note 569, art. II.

573. HYDE, *supra* note 618, at 172.

574. See *Examen*, *supra* note 569, at 177-84; JÈZE, *supra* note 527, at 39; see also *infra* notes 581-591 and accompanying text.

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the I.D.I. Declaration might represent the contemporary state of opinion, it was not binding on states because no state had signed it.

c. The Convention of St.-Germain-en-Laye, 1919

The next declaration on occupation came in 1919 with the Treaty of St.-Germain-en-Laye (the St.-Germain Treaty).⁵⁷⁵ Under Article 10 of the Treaty, the signatories "recognize[d] the obligation to maintain in the regions subject to their jurisdiction an authority and police forces sufficient to ensure protection of persons and of property and, if necessary, freedom of trade and transit."⁵⁷⁶ Unlike the Berlin Act (which it superseded for its signatories⁵⁷⁷), the St.-Germain Treaty did not by its terms restrict its application to the African coast. Thus, it applied the standard of effective occupation to all regions of the world.⁵⁷⁸ However, whereas in the Berlin Act the effectiveness requirement took the form of a condition for the acquisition of sovereignty over territory, it appeared in the St.-Germain Treaty as an ongoing requirement of sovereignty already acquired.⁵⁷⁹

3. The Definition of Terra Nullius

One of the most crucial questions in the Aouzou Strip dispute concerns the definition of territory that was lawfully subject to occupation. Libya may argue that France could not lawfully have occupied the Aouzou Strip because if the land was not under Turkish or Sanusi sovereignty, it was under the sovereignty of the Toubous. Chad may respond that the Toubous, as a political body, lacked the cohesiveness necessary to exercise rights of sovereignty.

These contentions echo a division among legal scholars of the colonial period. Writers were unanimous in stating that any land that was *terra nullius* was open to occupation. They differed among themselves, however, in defining *terra nullius*. In general, *terra nullius* was any part of the earth's surface that

575. Convention Revising the General Act of Berlin of 26 February 1885 and the Declaration of Brussels of 2 July 1890, Sept. 10, 1919, 8 L.N.T.S. 25. Signatories included the United States, Belgium, France, Great Britain, Italy, Japan, and Portugal.

576. *Id.* art. 10, 8 L.N.T.S. at 35.

577. *Id.* art. 13, 8 L.N.T.S. at 37.

578. See LINDLEY, *supra* note 528, at 149.

579. Decenière-Ferrandière, *supra* note 527, at 660. Some authors viewed the St.-Germain Treaty as regressive. Since it abrogated the Berlin Act and effectively did not replace Articles 34 and 35, they feared that states would interpret the treaty as an implied repeal of the effectiveness requirement. These authors argued that the abrogation of the Berlin Act was only an acknowledgment that the Act was no longer useful, since all the African coast had been occupied. See 1 FAUCHILLE, *supra* note 526, at 690-91. Others saw the St.-Germain Treaty as complementary to the Berlin Act. Genêt, *supra* note 527, at 314.

was not yet appropriated and was susceptible of occupation.⁵⁸⁰ The requirement that the land be as yet unappropriated caused considerable difficulty. Scholars agreed that uninhabited land and abandoned land, as well as land inhabited only by scattered individuals without any political organization, was *terra nullius*. They also agreed that land belonging to a recognized non-European state, such as Turkey or Japan, was not *terra nullius*.⁵⁸¹ They could not agree, however, whether the land possessed by "savage" or "barbaric" tribes with a rudimentary organization qualified as *terra nullius* or whether, on the contrary, such tribes were deemed to be sovereign and their rights entitled to respect.⁵⁸²

Jurists attempted to avoid this difficulty by looking to the degree of "civilization" of the native tribe. If a *terra nullius* was a territory characterized by a lack of civilization, then the question whether a particular area was *terra nullius* could, in theory, be answered by reference to the degree of civilization of its inhabitants. This effort, however, proved similarly incapable of yielding definitive results, since the process of defining civilization and *terra nullius* was essentially circular. Commentators could not agree on a definition of "civilization," and each supplied a definition that best supported his conclusions.

a. *The Three Schools of Thought on Tribal Sovereignty*

Scholarly opinion on the sovereignty of "savage" tribes was essentially divided into three schools of thought.⁵⁸³ The first school, relying on the state practice of occupying the land of such tribes, held that such tribes possessed no rights of sovereignty under international law and that civilized states could

580. Genêt, *supra* note 527, at 429; *see also* HYDE, *supra* note 618, at 167 (occupation "is only available for use in relation to lands not subjected to a claim of sovereignty deemed entitled to respect"); JÈZE, *supra* note 527, at 59. The requirement that the object of appropriation be susceptible of occupation was included primarily to exclude from *terra nullius* the high seas. Genêt, *supra* note 527, at 434-36; *see also* JÈZE, *supra* note 527, at 59-62.

581. *See* BONFILS, *supra* note 528, at 303-08; 1 FAUCHILLE, *supra* note 526, at 692-708; JÈZE, *supra* note 527, at 71-86. In the *Western Sahara* pleadings Mauritania presented the same view of the contemporary European conception of *terra nullius*. Written Statement of Mauritania, 1981 I.C.J. Pleadings (3 Western Sahara) 28-32 (Mar. 27, 1975).

582. Distinguishing tribes that possessed a degree of organization sufficient to be deemed entitled to sovereignty from those that did not prompted one scholar to note that defining *terra nullius* was easy in theory but very difficult in practice. SALOMON, *supra* note 527, at 191-92. A further complication in deciding whether international law recognized sovereign rights in native tribes arises from the disparity between the insistence of some writers that natives' sovereignty be respected and the occasional practice of some states of ignoring any claims of tribal sovereignty. *See id.* at 191-92.

583. For summaries of these three schools, *see* Written Statement of Mauritania, 1981 I.C.J. Pleadings (3 Western Sahara) 32-37 (Mar. 27, 1975); BONFILS, *supra* note 528, at 303-08; 1 FAUCHILLE, *supra* note 526, at 697-99; LINDLEY, *supra* note 528, at 11-20; *see also* JÈZE, *supra* note 527, at 87-112; Genêt, *supra* note 527, at 431-34. For a good modern summary, *see* SHAW, *supra* note 559, at 31-32.

therefore occupy their land at will.⁵⁸⁴ These writers argued that international law was meant to regulate only the conduct of the members of international society, and that since "uncivilised natives" were not members of international society, international law did not recognize or protect them.⁵⁸⁵ Civilization was defined as the ability "to supply a government adequate to the white men's needs or to [the natives'] own protection."⁵⁸⁶ Essentially, this view required natives of a territory to achieve a degree of development equivalent, or nearly so, to that of Europe. In practice, this view sanctioned occupation in any case where the natives were unable to resist a European intrusion—in effect making any occupation, once achieved, legal.⁵⁸⁷ Members of this school strongly disapproved of the practice of concluding "glass-bead" treaties of cession with native tribes. They preferred occupation to such treaties because they believed that the natives, having no conception of what Europeans meant by "sovereignty," were simply incapable of comprehending what they were ceding and thus were not competent to cede it.⁵⁸⁸

584. See LINDLEY, *supra* note 528, at 18; see also HERSHEY, *supra* note 540, at 185; JÈZE, *supra* note 527, at 88, 90-103; LAWRENCE, *supra* note 528, at 58-59; LAWRENCE 4th, *supra* note 528, at 57.

As one commentator stated:

Tracts roamed over by savage tribes have been again and again appropriated, sometimes after some kind of compensation has been given to the natives . . . , sometimes with no regard for their claims and wishes. And even the attainment by the original inhabitants of some degree of civilization and political coherence has not sufficed to bar the acquisition of the territory by occupancy.

LAWRENCE, *supra* note 528, at 146; see also LAWRENCE 4th, *supra* note 528, at 151.

Representative members of this school included Westlake, Hall, Lawrence, Oppenheim, and Rivier. Lindley wrote that most of his contemporaries also shared this view. LINDLEY, *supra* note 528, at 20. Malcolm Shaw provides some corroboration, reporting that the first school dominated at the end of the nineteenth century. SHAW, *supra* note 559, at 32. Although Calvo favored a rule of absolute respect for native sovereign rights, he seemed to recognize that the law permitted states to occupy the lands of "savage or barbaric tribes." See 1 CALVO, *supra* note 537, at 389.

585. While contemporary legal theory recognized that the natives certainly possessed moral rights—i.e. rights that should be respected as a matter of conscience, not a matter of law—it left the appreciation of those rights to the occupying state. WESTLAKE, CHAPTERS, *supra* note 614, at 136; WESTLAKE, COLLECTED PAPERS, *supra* note 541, at 138; see also LAWRENCE, *supra* note 528, at 146 ("All territory not in the possession of states who are members of the family of nations and subjects of International Law must be considered as technically *res nullius* and therefore open to occupation. The rights of the natives are moral, not legal. International Law knows nothing of them, though International Morality demands that they be treated with consideration."); LAWRENCE 4th, *supra* note 528, at 151; de Martitz, *supra* note 571, at 373-74.

586. 1 WESTLAKE, INTERNATIONAL LAW, *supra* note 525, at 105. Westlake elaborated on this definition, stating that a civilized government should protect the life of its people "from being disturbed by contests between different powers for supremacy on the same soil" and guarantee the natives "a security and well-being at least not less than that they enjoyed before the arrival of the strangers." WESTLAKE, CHAPTERS, *supra* note 614, at 141; see also WESTLAKE, COLLECTED PAPERS, *supra* note 541, at 143.

587. The same result followed from these scholars' view of the duties of the occupying state. Since such a state had to supply an organization that was capable of excluding any other power, and the natives did not possess such an organization, they could not be deemed to have a right of sovereignty over the territory they inhabited.

588. See John Westlake, *Le conflit anglo-portuguais*, 23 REVUE DE DROIT INTERNATIONAL 243, 248 (1891) [hereinafter Westlake, *Le conflit*]; see also WESTLAKE, CHAPTERS, *supra* note 614, at 149-55; *Examen*, *supra* note 569, at 180-81 (stating that European states must guard against treaties with local chiefs selling rights of sovereignty for "bottles of rum") (comments of Alphonse Rivier, President of commission

The second school held that such tribes possessed a right of sovereignty that was circumscribed by the superior rights of civilization and colonization.⁵⁸⁹ In effect this theory produced the same results as the first school: if a European state wanted to take the land, it had only to assert its superior rights. It was essential to the advocates of this view, however, that the occupying state actually need the territory and be able to utilize it more effectively than the natives; that is, it must actually try to colonize and civilize the territory.⁵⁹⁰ In reality, this requirement posed no obstacle to an appropriation of territory. Whatever its results, the theory at least permitted its advocates to salve their consciences by claiming to treat natives as sovereign states. Among the best-known jurists in this school were Vattel, Bluntschli, Phillimore, Fiore and G.F. de Martens. This school had largely died out and possessed few proponents by the late nineteenth century.

The third school⁵⁹¹ held that "savage" tribes possessed a right of sovereignty that was entitled to absolute respect as long as the members of the tribe were "connected by some political organization, however primitive and crude."⁵⁹² Any other view, they argued, would sanction the principle that might makes right.⁵⁹³ They insisted that the only permissible means of acquiring the land held by such tribes was the use of treaties of cession executed in full conformity with all tribal customs and rules.⁵⁹⁴

charged with producing I.D.I. Declaration). Writers in this school also argued that since such peoples did not constitute states in international law, and that only states could cede sovereignty, any treaties of cession concluded with "savage" tribes were *ipso facto* void. See de Martitz, *supra* note 571, at 373-74.

589. See LINDLEY, *supra* note 528, at 17; see also JÈZE, *supra* note 527, at 89-90.

590. 2 FIORE, *supra* note 534, at 134-35, 151; cf. JÈZE, *supra* note 527, at 108-12.

591. Writers in the third school included Fiore, Despagnet, Bonfils, Salomon, Lindley, Calvo, and Jèze. Malcolm Shaw contends that "[s]tate practice of the period reveals that Africa was not regarded as *terra nullius* and that occupation was not therefore available as a mode of acquiring legal title to territory." SHAW, *supra* note 559, at 33. However, Shaw contradicts this point on the previous page by acknowledging that the view of the first school dominated the scholarship of the period. *Id.* at 32.

592. LINDLEY, *supra* note 528, at 12-17; see also JÈZE, *supra* note 527, at 112-17. M.F. Lindley gave perhaps the best statement of the view of this school:

Many of the so-called "savage" races . . . possess organized institutions of government, and it cannot be truly said that the territory inhabited by such races is not under any sovereignty. Such sovereignty as is exercised there may be of a crude and rudimentary kind, but, so long as there is some kind of authoritative control of a political nature which has not been assumed for some merely temporary purpose, such as a war, so long as the people are under some permanent form of government, the territory should not, it would seem, be said to be unoccupied.

LINDLEY, *supra* note 528, at 20; see also 1 FAUCHILLE, *supra* note 526, at 697 ("any organization whatsoever, however imperfect and rudimentary one may consider it, must remove a territory from the possibility of occupation"); SALOMON, *supra* note 527, at 200 ("the beginnings, however rudimentary and imperfect, of political organization" remove tribe's land from *terra nullius*).

593. See LINDLEY, *supra* note 528, at 15-17; JÈZE, *supra* note 527, at 88-89, 103-08; SALOMON, *supra* note 527, at 208-09.

594. The members of the first school criticized this method as unworkable. They argued that instead of producing certainty in titles, which was the purpose of the Berlin Conference, treaties of cession created uncertainty because they permitted any state at any time to raise a challenge based upon a simple procedural deficiency. See WESTLAKE, CHAPTERS, *supra* note 614, at 139-40.

According to this school, only "a tract of country . . . inhabited only by isolated individuals who were not united for political action" could be subject to occupation.⁵⁹⁵ Lindley cites Australia as an example of such a territory, since the natives had no form of "civil polity" and the British found "no political society to be dealt with."⁵⁹⁶ These statements imply that the true test in the view of the third school was the capacity of the natives to deal as a political body with Europeans. If the territory possessed no community capable of binding its members in the community's relations with foreign powers, the community lacked sovereignty and thus was *terra nullius*.⁵⁹⁷

Writers in this school defined "civilization" broadly. They believed that the European model was not the only form a state could take. So long as the community in question was able to get its members to conform their behavior to a standard, whether by punishment, custom, or fear of supernatural consequences, these writers were willing to recognize it as a sovereign state.⁵⁹⁸ They invoked state practice in support of their views, arguing that the conclusion of treaties with tribal chiefs implied a recognition of sovereign rights.⁵⁹⁹ However, the Berlin Act contradicts the position of the third school. Article 35 of the Berlin Act, which applied only to occupations, allowed states to adopt and make use of native institutions of governance in establishing the necessary authority in the territory.⁶⁰⁰ The delegates at Berlin therefore could not have viewed the existence of such institutions as an automatic bar to occupation.

Neither of the nineteenth-century efforts to codify the law of occupation resolved the question of native sovereignty. At the Conference of Berlin the U.S. delegate, John A. Kasson, attempted to have the conference adopt the view of the third school. Kasson put forward a proposal stating that

[m]odern international law follows closely a line which leads to the recognition of the right of native tribes to dispose freely of themselves and of their hereditary territory. In conformity with this principle [the United States] government would gladly adhere to a more extended rule, to be based on a principle which should aim

595. 1 FAUCHILLE, *supra* note 526, at 697; *see also* LINDLEY, *supra* note 528, at 23; SALOMON, *supra* note 527, at 200; SHAW, *supra* note 559, at 31.

596. LINDLEY, *supra* note 528, at 40-41.

597. This same test was sanctioned by the I.C.J. in the *Western Sahara* case. *See infra* notes 605-607 and accompanying text.

598. LINDLEY, *supra* note 528, at 21-22.

599. 1 CALVO, *supra* note 537, at 207; *see also* BONFILS, *supra* note 528, at 308; 1 FAUCHILLE, *supra* note 526, at 700-01; JÈZE, *supra* note 527, at 128-31, 142-45. This view of civilization found some support in the *Barotse* arbitral award, which defined a "Paramount Ruler" as "he who exercises governmental authority according to [customary law]," essentially by appointing and deposing subordinate chiefs, by deciding disputes between them, and by obliging them to recognize his paramount status. *Quoted in* SHAW, *supra* note 559, at 40. These writers also recognized, however, that states often deviated from the principles ostensibly enshrined by the conclusion of treaties with natives, because the natives frequently did not understand the import of their actions and because the states often ignored their treaty obligations. *See* JÈZE, *supra* note 527, at 147-61.

600. *See supra* note 556.

at the voluntary consent of the natives whose country is taken possession of, in all cases where they had not provoked the aggression.⁶⁰¹

While the conference did not adopt a contrary statement, it "hesitated to express an opinion" on Kasson's proposal, noting that it "touched upon delicate questions."⁶⁰² But the amendment of Article 35, which permitted occupying states to make use of existing native institutions of governance, implicitly rejected Kasson's proposal.⁶⁰³ The Institut de Droit International was also unable to reach a consensus on this question, and it decided not to issue any definition of *terra nullius*.⁶⁰⁴ Thus the question of indigenous tribes' sovereignty remained an unsettled aspect of the law of occupation.

b. *The View of the International Court of Justice in the Western Sahara Case*

The 1975 *Western Sahara* case⁶⁰⁵ called upon the International Court of Justice, in assessing the legal ties between Western Sahara on one hand and the "Mauritanian entity" on the other, to determine the European opinion on tribal sovereignty. The Court bypassed the scholarly debate and decided the question on the basis of state practice: "Whatever the differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terra nullius*."⁶⁰⁶ The Court then

601. Quoted in WESTLAKE, CHAPTERS, *supra* note 614, at 138.

602. *Id.* (quoting comments of Mr. Busch, Undersecretary of State for Foreign Affairs of Germany, presiding at meeting); see also LINDLEY, *supra* note 528, at 33-34; SALOMON, *supra* note 527, at 210-16.

603. See *supra* note 556 and accompanying text.

604. *Id.* at 184. De Martitz's draft declaration proposed that *terra nullius* include "any region that does not find itself effectively under the sovereignty or under the protectorate of one of the States forming the community of the law of nations, whether this region is inhabited or not." *Examen*, *supra* note 569, at 177. De Martitz's draft also stated that "it is an exaggeration to speak of sovereignty of savage or semi-barbaric peoples." Like Westlake, de Martitz felt that such peoples were not members of the community of nations and consequently had no rights under international law. Similarly, because such peoples did not constitute a state, they could not validly cede sovereignty over territory through a treaty. De Martitz, *supra* note 571, at 373-74; see also Genêt, *supra* note 527, at 317-18.

Several members of the Institut objected to this definition, contending that the concept of the "community of the law of nations" was vague and difficult to apply and would lead to the "invasion and spoliation" of less advanced peoples. *Examen*, *supra* note 569, at 178 (comments of Édouard Engelhardt), 180-81 (comments of Louis Renault). Others claimed that this definition did not accord with the practice of states. *Id.* at 180 (comments of L. de Bar). The argument contended that de Martitz's definition would have placed the American Indians, whom the European explorers viewed as within the "community of the law of nations," outside the community. Therefore, de Martitz's proposal defined *terra nullius* more broadly than did state practice.

Alphonse Rivier, the president of the commission charged with producing the declaration, attempted to salvage de Martitz's proposal by stating that it meant to exclude from the "community of the law of nations" only those tribes which, by their lack of organization, were not capable of concluding treaties. *Id.* at 180. Rivier would have defined a state as "an organized political body; a nomadic tribe is not a state." *Id.* at 181.

605. 1975 I.C.J. 10 (Oct. 16)

606. *Id.* at 39.

determined that Western Sahara was not a *terra nullius* at the time of Spanish colonization because it was inhabited by peoples "which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them," and because Spain concluded treaties with local chiefs, thus indicating that Spain did not view their territory as *terra nullius*.⁶⁰⁷ Such a test creates a high obstacle for any state seeking to prove that an area was *terra nullius* at the time it or its predecessor took possession of the territory.

The Court's reasoning was badly flawed as a matter of history. The Court based its conclusion on the contemporary practice of concluding treaties of cession with the native rulers, but this practice does not provide a stable foundation for the argument the Court built upon it. True, the colonial powers did rely on such treaties to enforce the rights of sovereignty they claimed over the land thus acquired. But the Court's conclusion is vulnerable because such treaties were intended merely to demonstrate a state's interest in an area and to warn other states to stay away. They were not meant to be "documents of a central character" in international law.⁶⁰⁸ In a related argument, Max Huber, the arbitrator in the *Island of Palmas* case, held that such documents were better viewed as contracts assigning the grant of various rights of industrial and commercial exploitation, and not as treaties capable of creating rights and obligations in international law.⁶⁰⁹ Huber likely based his conclusion on a belief that uncivilized tribes were not persons subject to international law and thus could not conclude treaties.⁶¹⁰

It also seems odd, to say the least, that the European states would have gone to the trouble of defining the conditions for the future occupation of

607. *Id.* at 81. Unfortunately, once the Court found on these grounds that Western Sahara was not *terra nullius*, it relieved itself from the obligation of deciding whether the territory's ties to the Moroccan Sultanate or to the Bilad Shinguitti removed it from the domain of *terra nullius*. *Id.* at 39-40. Had the court decided these questions, it would have introduced some certainty into the law that could provide guidance in the Aouzou Strip dispute.

608. SHAW, *supra* note 559, at 37. For a similar view see SHARMA, *supra* note 544, at 97-101. In discussing protectorate treaties concluded by Great Britain with Somali tribes in 1884-1886, Sharma notes that the treaties themselves, under a purely textual reading, could be taken as proof that "the British Government regarded the Somalis as independent peoples capable of entering into agreements with other sovereign states." *Id.* at 100. However, Sharma cautions that the expectations of the parties

have to be interpreted in the light of the full context and realistic objectives of the parties. The main purpose of the British Government in concluding treaties with the tribesman was . . . "to exclude any other European State from the [area]", and . . . the supposed independence of the tribes was largely a matter of legalistic and political convenience. This appraisal of the shared expectations of the parties is reinforced by the subsequent conduct of the Great Britain as manifested in the establishment of British administration carried out through . . . an advisory council which actually ruled most of the regions occupied by these tribes. . . . [T]he British Government did not regard the tribes of Somaliland as sovereign, or even as semi-sovereign, but it considered them as no more than subjects of the British Crown.

Id. (citation omitted).

609. For a discussion of this argument, see Written Statement of Mauritania, 1975 I.C.J. Pleadings (3 Western Sahara) 3, 51 (Mar. 27, 1975); see also SHAW, *supra* note 559, at 37.

610. Sharma draws a parallel between the British agreements with the Somalis and the Dutch agreements with the local rulers in *Island of Palmas*. See SHARMA, *supra* note 544, at 100-01.

territory in Africa at the Conference of Berlin if they had not believed that any part of Africa was even subject to occupation in the first place. Nor would they have amended the draft of Article 35 of the Berlin Act to allow occupying states to make use of existing native institutions of government if the land inhabited by these natives could not be legally occupied. The Court's conclusion is therefore historically incorrect.

In all fairness, the Court in *Western Sahara* was operating within narrow confines, given the politically sensitive nature of the dispute. The Court felt that the General Assembly had called upon it not to furnish an opinion that would enable the General Assembly to settle a "dispute or legal controversy,"⁶¹¹ but rather to supply "an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory."⁶¹² The Court was also acutely aware that the fate of Western Sahara would be determined by "the population of Western Sahara . . . by their own freely expressed will," notwithstanding the General Assembly requesting the Court's advisory opinion.⁶¹³ The Court did not perceive itself as free to render a decision outside these constraints. If the Court had found that Western Sahara was *terra nullius* at the time of the Spanish colonization, it would essentially have prejudged the question of Moroccan or Mauritanian sovereignty over Western Sahara, thus limiting its own freedom to explore the legal ties between Western Sahara and the claimants. By disposing of the *terra nullius* question peremptorily, the Court stayed within the confines imposed by the General Assembly.

c. Summary

In conclusion, late nineteenth and early twentieth century scholars were deeply divided over whether the lands of "savage" tribes could be subject to occupation. Nor does the practice of colonial powers settle the question definitively, notwithstanding the decision of the I.C.J. in *Western Sahara*. The evidence appears to support an alternative conclusion—namely, that states viewed land inhabited by disorganized natives as open to occupation. In any event, it seems clear that if a community was incapable of binding its members in its relations with foreign powers through a treaty, even the most generous publicists would have considered its land a *terra nullius*.

611. 1975 I.C.J. at 26.

612. *Id.* at 27.

613. *Id.* at 36.

4. Time Required to Complete an Occupation

As discussed above, three powers—the Sanusi, Turkey, and France—were present in the Aouzou Strip for varying lengths of time between 1900 and 1916. The dispute can therefore be expected to raise issues as to the length of time required to perfect a title by occupation. If Turkey or the Sanusi exercised effective control over the area, and did so for a long enough time, then absent an abandonment or transfer of title by cession, conquest, or prescription, France could not lawfully have acquired sovereignty over the area through occupation. Although the jurists of the period were able to define with some degree of clarity the conditions required for an effective occupation, they were unfortunately not as successful in defining the period in which those conditions had to be satisfied. Instead, the scholars simply shrank from the question and stated that each case had to be appreciated on its own facts. Consequently the law here was murky and unpredictable, and it left states no guidance.

Much of the scholarly discussion drew upon the principles of inchoate title, first elaborated in previous centuries when states acquired territory by discovery, and extended them to occupation.⁶¹⁴ A state that was occupying territory obviously could not be expected to create overnight the kind of administration required by the law.⁶¹⁵ In that sense, all occupations were initially constructive.⁶¹⁶ Therefore, although the initial acts of occupation could not be said to create an effective occupation in themselves, they did confer an inchoate title for a certain period.⁶¹⁷ The state would then have a limited period in which to perfect its title by continuous and undisturbed possession of the territory.⁶¹⁸ Other states were not precluded as a matter

614. SALOMON, *supra* note 527, at 283-84. Although discovery alone (or coupled with symbolic acts constituting a constructive occupation) was formerly said to confer a complete title, by the nineteenth century the opinion of most jurists had shifted to hold that discovery sufficed to create only an "inchoate" title, which the occupying state then had to perfect by an effective occupation within a reasonable time. WESTLAKE, COLLECTED PAPERS, *supra* note 541, at 161; *see also* 1 FAUCHILLE, *supra* note 526, at 715; 2 FIORE, *supra* note 534, at 145; Decencière-Ferrandière, *supra* note 527, at 378.

Jurists were careful to distinguish inchoate title, which they viewed as a political consequence of discovery and a matter of comity, from a right conferred by law. The state with inchoate title did not have a legal right to exclude others; rather, the inchoate title served as notice to other states of the occupant's intention, so that any attempt by another state to acquire the territory would be considered a hostile act. JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 158 (Cambridge, Cambridge U. Press 1894) [hereinafter WESTLAKE, CHAPTERS]; Westlake, *Le conflit*, *supra* note 588, at 256; *see also* HERSHEY, *supra* note 540, at 186-87; LAWRENCE, *supra* note 528, at 146; LAWRENCE 4th, *supra* note 528, at 152.

615. WESTLAKE, CHAPTERS, *supra* note 614, at 159-60; 1 WESTLAKE, INTERNATIONAL LAW, *supra* note 525, at 108; Westlake, *Le conflit*, *supra* note 588, at 257.

616. SALOMON, *supra* note 527, at 283-84.

617. This inchoate title, whether based on discovery or occupation, could not defeat a rival claim "founded on continuous and peaceful display of sovereignty." Island of Palmas Case (U.S. v. Neth.), 2 R.I.A.A. 829, 869 (1928).

618. *Id.* at 846; CHARLES C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 194 (1922); 1 WESTLAKE, INTERNATIONAL LAW, *supra* note 525, at 107-09.

of law from attempting to acquire the territory during this time, but such attempts would be viewed as unfriendly acts. If the state with inchoate title failed to perfect its title within the period, the international community could presume that the state no longer desired to occupy the territory, and the territory would revert to *terra nullius* and become open to occupation by other states.⁶¹⁹

However, scholars could not agree on any fixed time in which the occupying state had to perfect its title. Some suggested twenty-five years,⁶²⁰ but the overwhelming majority of opinion rejected any attempt to impose a fixed limit on all occupations.⁶²¹ The predominant view held that the occupying state had a "reasonable" period in which to complete its occupation, and that the meaning of "reasonable" necessarily varied with the circumstances of each case. Such circumstances included the manner in and circumstances under which acts of possession were performed, "the state of the arts of communication and transportation at the time," the size of the territory, the volume of enterprise flowing into the region, and any other factor that would make occupation unusually difficult or especially easy.⁶²² If the time required to complete an occupation does become an issue in the pending case, such considerations will have ambiguous implications. On one hand, the relative inaccessibility of the region supports an argument for permitting a longer period in which to complete an occupation. On the other hand, the knowledge that other powers had designs on the area would militate in favor of leaving occupying powers a shorter period.

5. *The Extent of the Occupied Territory: Hinterland Theories*

The definition of *terra nullius* was not the only issue on which international legal scholars disagreed. As Amos Hershey noted in 1912, "there is a wide difference of opinion when it comes to the difficult question of determining the area within which an effective occupation operates."⁶²³ According to one

619. See, e.g., SALOMON, *supra* note 527, at 283-84; THOMAS A. WALKER, A MANUAL OF PUBLIC INTERNATIONAL LAW 28 (Cambridge, Cambridge U. Press 1895); cf. 2 FIORE, *supra* note 534, at 145.

620. See, e.g., 2 FIORE, *supra* note 534, at 151. Fiore's proposal of a fixed period for all cases is somewhat inconsistent with his statement in the same work that the time required to complete an occupation must vary with the circumstances of each case. See *infra* note 622 and accompanying text.

621. WESTLAKE, COLLECTED PAPERS, *supra* note 541, at 166-69; see also JÈZE, *supra* note 527, at 242-43; WESTLAKE, CHAPTERS, *supra* note 614, at 163-65; Westlake, *Le conflit*, *supra* note 588, at 259-60.

622. Hayton, *supra* note 544, at 394; see also BONFILS, *supra* note 528, at 310; 2 FIORE, *supra* note 534, at 143-44; WESTLAKE, CHAPTERS, *supra* note 614, at 165-66; Westlake, *Le conflit*, *supra* note 588, at 260.

623. HERSHEY, *supra* note 540, at 187; see also SALOMON, *supra* note 527, at 319-20. Not only scholars but states, too, could not agree on the matter. At least one commentator believed that the position states took on this question depended solely on self-interest and thus varied in different situations. Decen-cière-Ferrandière, *supra* note 527, at 646.

view, a state could claim no more territory than it effectively occupied.⁶²⁴ This was the view adopted in the I.D.I. Declaration.⁶²⁵ The other view held that a state was entitled to occupy not only the land under its effective administration, but also a hinterland⁶²⁶ comprising all territory within the "natural boundaries" of the area that was "essential to the independence and security" of the settlement.⁶²⁷ This difference of opinion may become relevant to the Aouzou Strip dispute if Libya argues that the area now constituting northern Chad was actually an Ottoman hinterland.

624. HERSHEY, *supra* note 540, at 187; 1 FAUCHILLE, *supra* note 526, at 721, 734; JÈZE, *supra* note 527, at 288-90; 1 OPPENHEIM, *supra* note 528, at 279; *see also* SALOMON, *supra* note 527, at 324-27; WESTLAKE, CHAPTERS, *supra* note 614, at 166; WESTLAKE, COLLECTED PAPERS, *supra* note 541, at 170.

Of course, jurists recognized that any occupation was necessarily constructive at first. *See supra* notes 614-619 and accompanying text; *see also* HALL, *supra* note 528, at 107; LINDLEY, *supra* note 528, at 271. Consequently, even those most in favor of limiting the territory that could be claimed to the area that was effectively occupied allowed the occupying state to assert an initial claim to more land than it had occupied. The state would then have "not only a reasonable, but ample, time" to complete the occupation of the entire area. During that time, its inchoate title to the region would be exclusive, and no other state could occupy any part of the region claimed. This view had the virtue of preventing conflicts between rival occupants. 1 FAUCHILLE, *supra* note 526, at 726-29, 734; HALL, *supra* note 528, at 108; HERSHEY, *supra* note 540, at 188; WESTLAKE, COLLECTED PAPERS, *supra* note 541, at 163-65; *Examen*, *supra* note 569, at 174-75 (comments of John Westlake). The *Island of Palmas* award agreed with this view, recognizing the necessity of relaxing the effectiveness requirement at early stages of an occupation, but holding that after this phase the display of sovereignty "must make itself felt throughout the whole territory." *Island of Palmas Case* (Neth. v. U.S.), 2 R.I.A.A. 829, 855 (Huber, Arb., Apr. 1928).

Under the opposing view, a state could notify other states of its taking of possession only when the occupation had become effective throughout the entire extent of the territory. Until that time any other state could occupy another part of that territory. *Examen*, *supra* note 569, at 174-75 (comments of John Westlake).

625. *See supra* note 570 and accompanying text.

626. Some confusion may arise between two meanings ascribed to the term "hinterland." As used here, hinterland denotes the unoccupied back country that, for reasons of security or history, is considered appurtenant to nearby occupied territory. Jurists occasionally used the term to refer to a process of defining by treaty with other interested powers an area in which one state would have exclusive rights. Such an area is better described as a sphere of influence. *See infra* notes 805-817 and accompanying text.

627. HERSHEY, *supra* note 540, at 187 & n.22; *see also* BONFILS, *supra* note 528, at 309; 1 CALVO, *supra* note 537, at 408-09; 2 FIORE, *supra* note 534, at 149; LAWRENCE, *supra* note 528, at 149; LAWRENCE 4th, *supra* note 528, at 155. Even these publicists agreed that the territory so claimed had to be reasonable in relation to the size of the occupied territory. *See* LAWRENCE, *supra* note 528, at 149-51; LAWRENCE 4th, *supra* note 528, at 156-57; WALKER, *supra* note 619, at 29-30.

The notification requirement contained in the Berlin Act created a further question: whether the notification, where the law required one, had to contain a determination of the limits of the territory occupied. Such a requirement, its supporters argued, would have produced certainty and avoided territorial disputes. BONFILS, *supra* note 528, at 302-03. Great Britain had proposed at the Conference of Berlin that notifications should always contain such a determination. 1 WESTLAKE, INTERNATIONAL LAW, *supra* note 525, at 106. This proposal would have encountered some problems in application since the territory was largely unknown and the occupying state could not be expected to give a very precise description of the area. Despagnet, *supra* note 556, at 108; Genêt, *supra* note 527, at 320. The Berlin Act did not adopt the British proposal as a formal requirement of notification. However, Annex I to Protocol 8 of the Berlin Act stated that "it remained understood that notification was inseparable from a certain determination of limits" and that other concerned powers could require the notifying state to be specific in order to protect their own rights and interests. Berlin Act, *supra* note 555, Protocol 8, Annex I, *reprinted in* SCRAMBLE, *supra* note 553, at 245, 247; *see also* WESTLAKE, CHAPTERS, *supra* note 614, at 167; WESTLAKE, COLLECTED PAPERS, *supra* note 541, at 170; 1 WESTLAKE, INTERNATIONAL LAW, *supra* note 525, at 106.

Those publicists who favored relaxing the effectiveness requirement advanced several theories to justify their position. These theories arose from three considerations: geographical proximity, natural features, or economic or strategic need.⁶²⁸ They were rather vague in defining the exact amount of territory a state could claim without having to occupy it. In general, the publicists disfavored such theories, arguing that they had no real legal basis and that their only justification lay in convenience.⁶²⁹ However, states continued to advance such claims—Turkey's 1890 and 1899 notes are examples—and hinterland arguments gained some recognition from international tribunals, especially in cases where no other power disputed the title of the state claiming the hinterland.

a. *The Restrictive View of the Publicists*

States sometimes invoked the first class—theories of proximity and contiguity—to justify claims to an unoccupied hinterland that was close or adjacent to territory that had been occupied. Such theories were particularly common in the case of two islands near each other or in the case of an island lying close offshore. Yet jurists generally denied that proximity without an effective occupation could support a valid title. They argued that if proximity conferred upon a state superior faculties for occupying a territory, that state should exercise those faculties.⁶³⁰ Thus any effect of proximity was purely political, not legal.

In the *Island of Palmas* award Max Huber addressed the contiguity theory and concluded that it had "no foundation in international law."⁶³¹ Huber noted that the principle was "by its very nature . . . uncertain and contested," that it conflicted with the requirement of effective occupation, and that its application would "lead to arbitrary results."⁶³² Huber therefore stated that even isolated displays of sovereignty would defeat a claim based on territorial continuity.⁶³³

Under a second theory, based on natural boundaries, states invoked geographical features in order to claim more territory than they had effectively occupied. A state relying on this theory could assert a claim to a hinterland

628. See WESTLAKE, CHAPTERS, *supra* note 614, at 168-74.

629. See LINDLEY, *supra* note 528, at 234-35. According to Lindley, states were more tolerant of such claims when unoccupied territory was relatively abundant, but as the amount of such territory shrank international law changed to require more precise methods of asserting claims, such as the sphere of influence doctrine discussed below. *Id.*; see also *infra* notes 652-663 and accompanying text.

630. LINDLEY, *supra* note 528, at 228-29; see also 1 FAUCHILLE, *supra* note 526, at 725-26; SALOMON, *supra* note 527, at 324-27; Genêt, *supra* note 527, at 442.

631. *Island of Palmas Case* (Neth. v. U.S.), 2 R.I.A.A. 829, 869 (Huber, Arb., Apr. 1928).

632. *Id.* at 854-55.

633. *Id.* at 855; see also 1 OPPENHEIM, *supra* note 528, at 280 (stating that tribute from remote tribes or police sweeps of remote areas can show extent of effective occupation).

containing all the territory adjacent to the occupied land within the natural boundaries of the region—rivers, mountain ranges, and other prominent features that acted as barriers. This theory has some intuitive appeal, at least insofar as it advances certainty, but it was scarcely more successful than proximity theories in gaining recognition as a rule of international law.

Lindley supported this genre of hinterland theories and cited with approval the arguments made by Great Britain in its boundary arbitration with Venezuela. In that case Britain pointed out that natural boundaries are both easy to distinguish and hard to cross.⁶³⁴ Lindley also favored the use of ethnic and racial divisions as natural boundaries. He noted that such divisions had not "in the past been given the consideration they deserve" but were "being taken more frequently into account in fixing international boundaries in Africa" at the time of the publication of his book in 1926.⁶³⁵ He nevertheless concluded that these principles could not be said to be a rule of international law, and that the area a state could claim was still limited to the area it effectively occupied.⁶³⁶ Only where the claimed additional area formed a "physical unit" with the occupied territory and bore "a reasonable relation" to it in size could the state gain some rights to the additional area. But even in that case the state had to take possession of the area "within a reasonable time," or else its rights would lapse and the area would again be open to occupation by other states.⁶³⁷

Under the third theoretical justification for a hinterland, states invoked considerations of security or necessity for the development of their settlement. Italy advanced such reasons in support of its claims to northern Chad in the 1920s, arguing that the territory and the caravan routes that crossed it were necessary to the economic development of its Libyan colony.⁶³⁸ During the negotiations at the Conference of Berlin the British government instructed its delegate that, as a "general principle . . . if a nation has made a settlement it has a right to assume sovereignty over all the adjacent vacant territory which is necessary to the integrity of the settlement."⁶³⁹ In addition to its political appeal, this argument gained some acceptance, at least as long as the occupy-

634. LINDLEY, *supra* note 528, at 273. The Venezuela-British Guiana arbitration was highly irregular. Venezuela's counsel reported that the President of the tribunal had applied improper pressure on him in order to arrive at a consensus award, and alleged that the President might have made a secret deal with Great Britain. See SHARMA, *supra* note 544, at 288-93; Clifton J. Child, *The Venezuela-British Guiana Boundary Arbitration*, 44 AM. J. INT'L L. 682 (1951); William Cullen Dennis, Editorial Comment, *The Venezuela-British Guiana Boundary Arbitration of 1899*, 44 AM. J. INT'L L. 720 (1951).

635. *Id.* at 282.

636. *Id.* at 283.

637. *Id.*; see also WESTLAKE, COLLECTED PAPERS, *supra* note 541, at 172.

638. See *supra* note 365 and accompanying text.

639. Telegram from Lord Granville to Sir Edward Malet (Jan. 14, 1885), in SCRAMBLE, *supra* note 553, at 103-04 [hereinafter Granville Telegram].

ing state, at the initial stages of the occupation, could not know which additional land would be necessary for the security of the occupied territory.

However, jurists were scarcely more receptive to these claims than to other hinterland arguments. Lindley denied that economic or political considerations could furnish a basis for title.⁶⁴⁰ At a time when colonizing states had ample knowledge of the geography of the region, claims based on strategic importance made after the occupation rang hollow, because the state could have occupied all the necessary land from the beginning.⁶⁴¹ This implies that when states did not have such knowledge, the reason for denying additional territory claimed on grounds of necessity disappeared, and therefore that the law might recognize such a claim.

b. *The Permissive View Embodied in State Practice*

Although the majority of jurists denied the validity of hinterland claims, state practice presents quite a different picture. The British felt, regarding the necessity principle, that "no nearer approach to a general abstract rule can be collected from the writings of jurists" or from international disputes.⁶⁴² Indeed, several jurists supported this claim.⁶⁴³ France and Great Britain in 1890 and 1899 recognized that Turkey could claim a "reasonable" hinterland appurtenant to Tripolitania.⁶⁴⁴ Moreover, the hinterland was often difficult to distinguish from the desolate or sparsely inhabited areas for which the law required lesser displays of state authority.⁶⁴⁵ If a state possessed a settlement that provided the sole means of easy access to more remote regions—as was often the case with hinterland claims—that state might feel justified in claiming the remote regions as a hinterland and displaying lesser acts of authority than the law would otherwise require, since no other state was likely to challenge its claim.

The *Eastern Greenland* case illustrates these principles, particularly the lesser requirement of state authority where no other state challenged the claim. The P.C.I.J. determined, largely on the basis of Danish legislation concerning

640. LINDLEY, *supra* note 528, at 231-32.

641. *Id.* at 233-34.

642. Granville Telegram, *supra* note 639, at 103.

643. See HALL, *supra* note 528, at 110; cf. 1 WESTLAKE, INTERNATIONAL LAW, *supra* note 525, at 114-16 (expressing some support for such theories).

644. See *supra* notes 161, 260 and accompanying text. During the negotiations preceding the 1898 sphere of influence agreement, France also referred to the 1890 agreement as fixing the respective limits of "the Hinterland of our Mediterranean possessions and the British sphere of influence . . ." Letter from Gabriel Hanotaux, Minister of Foreign Affairs, to Baron de Courcel, French Ambassador to Great Britain (Jan. 18, 1898), in FRANCE, MINISTÈRE DES AFFAIRES ÉTRANGÈRES, DOCUMENTS DIPLOMATIQUES: CORRESPONDANCE ET DOCUMENTS RELATIFS À LA CONVENTION FRANCO-ANGLAISE DU 14 JUIN 1898, 1890-1898, No. 15, at 24 (Paris, Imprimerie Nationale 1899).

645. See *supra* notes 543-551 and accompanying text.

the disputed territory and with almost no evidence of the actual display of sovereignty on the spot, that Denmark had displayed sovereignty over Eastern Greenland.⁶⁴⁶ In framing its decision the Court noted the need to take into account "the extent to which the sovereignty is also claimed by some other power."⁶⁴⁷ The Court emphasized that until 1921 no other state had disputed Denmark's claim, and until 1931 no other state had advanced a competing claim.⁶⁴⁸ Given the "absence of any claim to sovereignty by another Power, and the Arctic and inaccessible character" of the region, Denmark's modest acts were sufficient to create "a valid claim to sovereignty."⁶⁴⁹

Eastern Greenland thus sanctioned the state practice of claiming territory as a hinterland, at least where no other state was asserting title to the territory. In such a situation a state could acquire sovereignty over the territory without having to display the full authority required in other contexts. In effect, a state claiming a hinterland enjoyed a presumption of sovereignty over the territory.⁶⁵⁰ However, under the principles announced in the *Island of Palmas* arbitration, a hinterland could not defeat an opposing claim based on continuous and peaceful possession of the same territory.⁶⁵¹

6. Spheres of Influence

Whatever legal status the hinterland possessed, states discovered another convenient way to determine the extent of the territory a state was entitled to claim: the sphere of influence.⁶⁵² By reaching reciprocal agreements with

646. Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 48-50, 62-63 (Apr. 5).

647. *Id.* at 46.

648. *Id.*; see also *id.* at 48 (lack of challenge to claims of King of Denmark and Norway).

649. *Id.* at 50-51; see also SHARMA, *supra* note 544, at 176-77 (comparing *Eastern Greenland* with *Minquiers and Ecrehos* (Fr. v. U.K.), 1953 I.C.J. 47 (Nov. 17) and concluding that Court required lesser acts to establish sovereignty in *Eastern Greenland* because territory there was "remote and inhospitable," whereas territory in *Minquiers and Ecrehos* was "the subject of constant activities and interests").

The Court further noted that, wholly apart from questions of estoppel against Norway, its holding with regard to Danish displays of state authority was by itself a sufficient basis on which to award title to Denmark. *Eastern Greenland*, 1933 P.C.I.J. (ser. A/B) No. 53, at 64.

650. See Marcel Paisant, *Les droits de la France au Niger*, 5 REUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 5, 28 (1898)

651. See *id.* at 28; Georg Schwarzenberger, *Title to Territory: Response to a Challenge*, 51 AM. J. INT'L L. 308, 312, 318 (1957); cf. Robert W. McKeon, Jr., Note, *The Aouzou Strip: Adjudication of Competing Territorial Claims in Africa by the International Court of Justice*, 23 CASE W. RES. J. INT'L L. 147, 159 (1991) (noting that hinterland claims alone cannot vest title to territory).

To be peaceful the possession must have been free from challenges. If a state claiming a hinterland protested another state's occupation of the territory in question, the occupying state's possession would not be peaceful. See SHARMA, *supra* note 544, at 180.

652. Another proposal would have required a state, in its notifications to other states, to give a precise determination of the limits of the territory it was claiming. See 1 FAUCHILLE, *supra* note 526, at 734-35; LAWRENCE 4th, *supra* note 528, at 159. This was also the proposal advocated by the Institut de Droit International in Article I of the I.D.I. Declaration. See *supra* note 570 and accompanying text.

other states in which each party pledged not to attempt to acquire sovereignty over certain areas reserved to the other, a state could effectively "fence off" an area which it could occupy later at its leisure. The exclusive area thus created was known as a sphere of influence or sphere of interest.⁶⁵³

Spheres of influence played an important role in the origins of the Aouzou Strip dispute. The Franco-British agreements of 1890, 1898, 1899, 1919, and 1924 defined the boundaries of a French sphere of influence. Chad will likely argue that the lines drawn by these agreements became the boundaries of Chad through acceptance by Italy and Libya. Libya might argue that the Bonnel de Mézières letters, purporting to leave northern Chad to the Sanusi and southern Chad to France,⁶⁵⁴ created a Sanusi sphere of influence that France was bound to respect and refrain from occupying.

States quickly recognized the sphere of influence as "a precious find of contemporary colonial policy,"⁶⁵⁵ and it became an increasingly common means of appropriating territory at the end of the nineteenth century.⁶⁵⁶ The attractiveness of the process lay in its ability to allocate land among the colonial powers without conflict⁶⁵⁷ and without the need for effective occupation.⁶⁵⁸

The proposal proved to be impractical because states often lacked sufficient knowledge of the regions they occupied at the time of the occupation. *See supra* note 627.

653. Despagne, *supra* note 556, at 109; 1 FAUCHILLE, *supra* note 526, at 735-36; LAWRENCE, *supra* note 528, at 153; LAWRENCE 4th, *supra* note 528, at 158; 1 OPPENHEIM, *supra* note 528, at 281; *see also* WESTLAKE, COLLECTED PAPERS, *supra* note 541, at 191-92; WESTLAKE, CHAPTERS, *supra* note 614, at 187; Pasquale Fiore, *Du protectorat colonial et de la sphère d'influence (Hinterland)*, 14 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 148, 155-56 (1907) [hereinafter Fiore, *Du protectorat*]; A.G. de Lapradelle, *Chronique internationale*, 17 REVUE DU DROIT PUBLIC 498, 522 (1902); *Cf.* Decencière-Ferrandière, *supra* note 527, at 652 (discussing mutual agreements determining each state's frontier).

International law recognized other forms of spheres of influence, but these are not relevant to the Aouzou Strip dispute. *See* LINDLEY, *supra* note 528, at 207-08 (discussing three types of spheres of influence).

654. *See supra* notes 292-296 and accompanying text.

655. Fiore, *Du protectorat*, *supra* note 653, at 156.

656. *See* Despagne, *supra* note 556, at 110 and examples cited therein.

657. Fiore, *Du protectorat*, *supra* note 653, at 157; *see also* LINDLEY, *supra* note 528, at 210. Decencière-Ferrandière felt that the sphere of influence was in this respect superior to effective occupation as a means of acquiring territory, since the difficulty of specifying effectiveness inevitably led to disputes and tensions. Decencière-Ferrandière, *supra* note 527, at 631.

658. Although states recognized that the sphere of influence was nothing but an end run around the requirement of effective occupation, they could not restrict each other's liberty to renounce their interests in certain areas, *see* Fiore, *Du protectorat*, *supra* note 653, at 157, even if they had wanted to. Yet states did not want to restrict this process; in fact, its popularity proves quite the opposite.

The circumvention of the effectiveness requirement earned the sphere of influence the special opprobrium of jurists who insisted on respect for native rights. *See, e.g.,* BONFILS, *supra* note 528, at 315; 1 FAUCHILLE, *supra* note 526, at 738. Many scholars noted that in this respect, the sphere of influence was merely a return to the days when territory was allocated by Papal bulls without regard for the effectiveness of the occupation. *See* Despagne, *supra* note 556, at 109. Westlake, in opposition to this view, argued that the sphere of influence did not obviate the need for effective occupation at all, since the state that had earmarked a sphere of influence still had to occupy the area at some point, lest other states who were not signatories to the treaty and thus not bound by it occupy the territory themselves. 1 WESTLAKE, INTERNATIONAL LAW, *supra* note 525, at 128. But this argument ignores the possibility of

Jurists who discussed the sphere of influence constantly reminded their audience that the rights obtained by such agreements were strictly circumscribed. Since the sphere of influence treaty was an agreement between states, it could not bind other states that were not parties to it—it was *res inter alios acta*. It could not be asserted by third parties or against them.⁶⁵⁹ Although other states might be obliged out of comity to respect a sphere of influence,⁶⁶⁰ they were under no legal obligation. By the same principle, a right granted by a sphere of influence treaty could not extinguish any rights of the inhabitants of the territory.⁶⁶¹ In sum, the sphere of influence could not confer a superior title valid *erga omnes* because it did not fulfill the objective conditions for title—the continued display of sovereignty or effective occupation.⁶⁶² Thus, for instance, Italy would not be bound to respect French rights

eliminating all realistic competition by concluding sphere of influence treaties with all the states that were likely to covet the territory. Once the state had done this, it gained an uncontested right to the territory without having to fulfill the requirements of occupation.

659. Despagnet, *supra* note 556, at 115; see also 1 FAUCHILLE, *supra* note 526, at 736; JÈZE, *supra* note 527, at 165-70; LAWRENCE, *supra* note 528, at 153; LAWRENCE 4th, *supra* note 528, at 158; LINDLEY, *supra* note 528, at 212; WESTLAKE, CHAPTERS, *supra* note 614, at 188. See generally LORD MCNAIR, *THE LAW OF TREATIES* 309-10 (1961) (noting that treaties are not binding on third parties). Despagnet noted that states could easily circumvent this feature by establishing a protectorate over, or concluding a treaty of cession with, native tribes, and then using the notification mechanism to make this act binding *erga omnes*. Despagnet, *supra* note 556, at 115.

Some scholars argued that over time, the hinterland treaty could bind other states. According to this argument, the lapse of a long period without protest or other actions to contest the rights to the territory could create an estoppel that would bar other states from asserting rights to the territory. This argument, however, did not succeed, because the law imposed no duty to speak on third parties, so their silence could not be taken as tacit assent. 1 WESTLAKE, *INTERNATIONAL LAW*, *supra* note 525, at 129.

660. Fiore, *Du protectorat*, *supra* note 653, at 158; see also HALL, *supra* note 528, at 135 (sphere of influence "rather implies a moral claim than a true right").

661. See LINDLEY, *supra* note 528, at 211; Despagnet, *supra* note 556, at 116-17; cf. Fiore, *Du protectorat*, *supra* note 653, at 158 (arguing that treaty should not be read as granting state limitless and arbitrary power over natives).

662. SHAW, *supra* note 559, at 49-50 (claim founded on sphere of influence cannot stand up to opposing claim founded on actual occupation); see also Despagnet, *supra* note 556, at 117-18 (despite irregularity of treaties concluded with native chiefs, such treaties confer title superior to claim founded on sphere of influence without more); cf. LINDLEY, *supra* note 528, at 212-13 (reporting remarks of U.S. Secretary of State that spheres of influence are "unknown in international law"); *id.* at 217 (states may consolidate sphere of influence into valid title by performing further acts showing sovereignty over territory).

Some went further and criticized the sphere of influence doctrine as not resting on "any rational foundation" since it ignored the distribution of native peoples. For this reason they also considered the doctrine dangerous and likely to lead to conflicts. See BONFILS, *supra* note 528, at 315.

André Decencière-Ferrandière argued that once territory was divided by means of a sphere of influence treaty, any dispute concerning the territory should be resolved by reference to the intent of the parties to the treaty, rather than the extent and nature of the occupation. By the act of assigning the territory by treaty, he contended, the parties had removed occupation as a factor in determining title. Decencière-Ferrandière, *supra* note 527, at 657. Thus, the intentions of France and Great Britain in the 1899 Declaration and the intentions of France and Italy in the 1902 Barrère-Prinetti letters would be dispositive in resolving allegations that France later occupied territory beyond that to which it had agreed to limit itself in those two earlier agreements. See *infra* note 791-794, 806-824 and accompanying text. In general, Decencière-Ferrandière's view would be true only in a dispute between the two signatory states or their successors, since a party to the treaty could not invoke it against a non-party, and vice-versa.

arising from the Franco-British sphere of influence agreements unless France secured Italy's assent⁶⁶³ or obtained valid title by some other means. France's obligations in the latter case would depend on whether the Toubous possessed rights of sovereignty over the territory. France would have to occupy the territory if it was *terra nullius*, or obtain consent of the Toubous if it was not.

7. *Disguised Occupation: The Colonial Protectorate*

One means of securing the consent of the inhabitants was the colonial protectorate. This device extended the principles of the protectorate—first applied in the context of relations between two states—to relations between states and "savage" tribes.⁶⁶⁴ However, the colonial protectorate possessed only dubious legal status because it was really an expedient designed to circumvent the effectiveness requirement.⁶⁶⁵ It also cynically manipulated the concept of native sovereignty because the colonial power pretended to recognize sovereign rights of the natives by concluding an agreement with them, but later proceeded to ignore any sovereign rights by annexing their land.⁶⁶⁶ Libya may argue that if they did not amount to an occupation, Turkey's dealings with

663. Chad will likely argue that the Barrère-Prinetti letters of 1902 performed this function. See *infra* notes 806-820 and accompanying text.

664. 1 FAUCHILLE, *supra* note 526, at 776. The protectorate, an alternative to occupation, allowed a state to assume control of another state's foreign relations while leaving to the protected state control over its internal affairs. Granville Telegram, *supra* note 639, at 104; CROWE, *supra* note 558, at 186 (quoting Sir Edward Hertslet). The territory that the protecting state thus acquired included all the land inhabited or occupied by the people of the protecting state. Granville Telegram, *supra* note 639, at 104.

Almost inevitably, the establishment of a protectorate over a state was a mere prelude to the later annexation of its territory. As a means of acquiring territory, this method proved more attractive than occupation, because the protectorate entitled the protecting state to exclude other states but did not entail the obligation of effective occupation. Although the Berlin Act did not extend the requirement of effective occupation to protectorates, Berlin Act, *supra* note 555, arts. 34, 35, 165 Consol. T.S. at 501; see also BONFILS, *supra* note 528, at 312; CROWE, *supra* note 558, at 179, 186-90; SALOMON, *supra* note 527, at 222, the I.D.I. Declaration of 1888 did require the protecting state to consummate an effective occupation of the territory. I.D.I. Declaration, *supra* note 569, art. I. Many scholars took the same view. JÈZE, *supra* note 527, at 239; LINDLEY, *supra* note 528, at 148-49; WESTLAKE, CHAPTERS, *supra* note 614, at 181; WESTLAKE, COLLECTED PAPERS, *supra* note 541, at 185.

However, strictly speaking a valid protectorate could arise only from a treaty between two states. SALOMON, *supra* note 527, at 226-27; LAWRENCE 4th, *supra* note 528, at 169-170. If the protected society did not constitute a state, it had no sovereignty, and therefore it could not alienate that part of its sovereignty concerned with foreign relations. The colonial protectorate permitted states to retain these attractive features but at the same time avoid the requirement that the object of the protectorate be a sovereign state.

665. *Id.* at 778; Fiore, *Du protectorat*, *supra* note 653, at 152 ("just a disguised mode of occupation that permits, by means of a simple diplomatic notification, [a state] to acquire territories and to absorb by a progressive attraction the protected populations"); see also WESTLAKE, CHAPTERS, *supra* note 614, at 181; cf. LAWRENCE 4th, *supra* note 528, at 168.

According to Decenière-Ferrandière, the attitudes of states changed after the Conference of Berlin. Those states that had the most to gain at Berlin by imposing strict standards for occupation later found those standards increasingly burdensome as they rushed to absorb territory faster than their competitors. As a result, all states began to slide away from the effectiveness requirement through such devices as the sphere of influence and the colonial protectorate. Decenière-Ferrandière, *supra* note 527, at 639, 642-45, 651-52.

666. Cf. Fiore, *Du protectorat*, *supra* note 653, at 155.

the Toubous—in particular, *Derde Chai's* acceptance of an Ottoman stipend and the dispatch of small detachments to Tibesti—effectively created a colonial protectorate.

Like a sphere of influence, a colonial protectorate could not by itself confer title, since it did not fulfill the requirement of effective occupation.⁶⁶⁷ The colonial protectorate served to warn off nonsignatory states, but it did not create a right against them. The protecting state had to occupy the territory if it wanted to gain title to it.⁶⁶⁸ Thus if another state effectively occupied the territory covered by a colonial protectorate, that state had a superior title. As in other cases, effective occupation trumped.

B. Prescription

Occupation permitted a state to acquire territory only when no other state had perfected a title to it. When the land was under the sovereignty of another state, international law provided other means for the acquisition of sovereignty over it. For example, the law permitted a state to gain title to territory through prescription (sometimes called *usucapion*).⁶⁶⁹ Prescription, analogous to the common-law property doctrine of adverse possession, generally required the same conditions. The possession had to be open, uninterrupted, and uncontested by the original possessor.⁶⁷⁰ As might be expected, the two doctrines shared common purposes as well: preserving a stable state of affairs and avoiding the disappointment of established expectations.⁶⁷¹ Accordingly, prescription could sanction an initial wrong if the effects of that wrong had become "part of the established international order."⁶⁷² Generally, however,

667. In a dispute with Great Britain over title to territory in southern Africa, Portugal advanced a variation of the colonial protectorate based on its efforts to civilize the natives. Portugal argued that the maintenance of "rudimentary relations" and "rudimentary commerce" with the natives demonstrated an intention to acquire and acts sufficient to confer title. 1 WESTLAKE, *INTERNATIONAL LAW*, *supra* note 525, at 140. Westlake vigorously denied that such activity could create a valid title. First, efforts to civilize provided too unstable a base on which to found title, since other nations would probably not assign the same value to them as the state that made those efforts. WESTLAKE, *CHAPTERS*, *supra* note 614, at 175-76; WESTLAKE, *COLLECTED PAPERS*, *supra* note 541, at 179. Second, since "commerce finds its recompense in itself," it could not be used to acquire sovereign rights over a people. WESTLAKE, *COLLECTED PAPERS*, *supra* note 541, at 179. Essentially, this amounts to saying that commerce was too commonplace an activity to establish a pattern of state activity. This result would augur poorly for potential Libyan arguments in the present case that trans-Saharan trade routes linking Tripolitania with the African interior formed a sufficient foundation for claims of sovereignty over the Aouzou Strip area.

668. See Paisant, *supra* note 650, at 29-30.

669. 1 CALVO, *supra* note 537, at 386; HALL, *supra* note 528, at 123-24; HYDE, *supra* note 618, at 192; LINDLEY, *supra* note 528, at 178; 1 OPPENHEIM, *supra* note 528, at 293-96.

670. LINDLEY, *supra* note 528, at 178-80; see also BONFILS, *supra* note 528, at 299; 1 OPPENHEIM, *supra* note 528, at 294-95.

671. LINDLEY, *supra* note 528, at 178; see also 1 CALVO, *supra* note 537, at 386.

672. LINDLEY, *supra* note 528, at 178; see also HALL, *supra* note 528, at 123; LAWRENCE, *supra* note 528, at 159; LAWRENCE 4th, *supra* note 528, at 166; 1 OPPENHEIM, *supra* note 528, at 294.

prescription operated only between states.⁶⁷³ Where the party deprived of possession was not a state and thus possessed no sovereign rights, the territory was *terra nullius* and the acquiror took possession by occupation, not prescription. As a result, one observer has commented that states did not use the doctrine in Africa during the colonial period.⁶⁷⁴ However, if the Aouzou Strip belonged to Turkey when the French took possession of it, this conclusion may be open to doubt.⁶⁷⁵

C. Conquest

A state could also acquire territory by conquest. Title by conquest arose by virtue of a military occupation during war between two states.⁶⁷⁶ Some scholars denied that simple military subjugation, without a treaty of cession or the passage of time sufficient to give rise to prescriptive title, could transfer territorial sovereignty.⁶⁷⁷ Others, however, held that conquest by itself conferred a valid title, provided that the victor annexed the territory.⁶⁷⁸ Ultimately, this dispute became irrelevant before it could be settled. With the increasing disapproval of war as a policy tool after World War I, conquest lost favor in international law.⁶⁷⁹

Because conquest was a valid means of occupation only between states, it did not apply to the military subjugation of peoples who, in the eyes of Europeans, did not constitute states.⁶⁸⁰ It might apply, however, to the rights Italy claimed by virtue of its military victory over Turkey in 1912.

A state could claim by conquest only the land it conquered and occupied.⁶⁸¹ However, if the invader won so complete a victory that no effective opposition remained, it had an exclusive right to claim all the territory of its opponent, regardless of whether the invader occupied that land at the end of the war.⁶⁸² Accordingly, after defeating Turkey, Italy could claim by con-

673. HYDE, *supra* note 618, at 192.

674. SHAW, *supra* note 559, at 283 n.149.

675. See *infra* notes 799-801 and accompanying text.

676. Legal Status of Eastern Greenland, 1933 P.C.I.J. (ser. A/B) No. 53, at 47 (Apr. 5).

677. 1 OPPENHEIM, *supra* note 528, at 287; BONFILS, *supra* note 528, at 300; 1 FAUCHILLE, *supra* note 526, at 763-66; HYDE, *supra* note 618, at 175-76; JÈZE, *supra* note 527, at 45. Some jurists required in addition that the war in which the territory was conquered be just. 2 FIORE, *supra* note 534, at 155-56; see also 1 FAUCHILLE, *supra* note 526, at 766-67 (requiring war to be just, but allowing victorious defender to claim territorial compensations from vanquished aggressor).

678. LINDLEY, *supra* note 528, at 47, 160; see also HILL, *supra* note 540, at 161-62; LAWRENCE, *supra* note 528, at 158; LAWRENCE 4th, *supra* note 528, at 165; WALKER, *supra* note 619, at 33.

679. See 1 FAUCHILLE, *supra* note 526, at 769-76.

680. See Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (Ser. A/B) No. 53, at 47 (Apr. 5); see also HYDE, *supra* note 618, at 175-76 (state may conquer territory, but "[i]f the inhabitants . . . are an uncivilized people, deemed to be incapable of possessing a right of property and control," source of title is really occupation; "conquest" refers to merely military effort and not to source of title).

681. LINDLEY, *supra* note 528, at 164.

682. *Id.* at 164; SHAW, *supra* note 559, at 45.

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quest only the land under its control, i.e., the coastal strip, because the Arab tribes remained in control of the interior.⁶⁸³ However, the Treaty of Lausanne in 1912 ceded to Italy all the land Turkey formerly controlled, a much larger area, and in 1923 Turkey further agreed to renounce all the rights it enjoyed in Libya by virtue of the 1912 treaty.⁶⁸⁴

D. Cession

Cession by treaty provided a final means of acquiring sovereignty over territory. Like prescription and conquest, however, cession operated only between states. On this point the debate between the different schools of thought on *terra nullius* resurfaced.⁶⁸⁵ To those jurists who held that native tribes had no rights of sovereignty and thus lacked the competence to cede it, an agreement by which a people not recognized as a state ceded territory to a state fell under the rubric of occupation.⁶⁸⁶ International law did not recognize such agreements as valid cessions.⁶⁸⁷ On the other hand, those jurists who maintained that tribes did possess rights of sovereignty held that such agreements not only were valid, but also constituted the sole legitimate means by which a state could acquire the territory inhabited by such peoples.⁶⁸⁸ Thus, if a tribe refused to sign a treaty, any acquisition of its land by a state would be illegal. This debate, like the underlying one on indigenous tribes' rights of sovereignty, was never resolved during the colonial period.

E. Abandonment

If a state subsequently abandoned territory after acquiring it, that territory reverted to *terra nullius*. However, the law was unsettled as to what acts and circumstances sufficed to imply an abandonment. The question deserves attention because either side in the Aouzou Strip dispute could claim that the other's predecessor abandoned the disputed territory. Libya could claim that

683. LINDLEY, *supra* note 528, at 163.

684. *Id.* at 164.

685. See *supra* notes 581-591 and accompanying text.

686. 1 OPPENHEIM, *supra* note 528, at 268-69; see also LAWRENCE, *supra* note 528, at 155. According to Salomon (who believed that tribes did possess competence to cede territory), when an entity that was not a person in international law purported to cede territory, the agreement constituted only a renunciation of that entity's rights to such territory but did not transfer those rights to the other party. Instead, the territory became *terra nullius*, and title arose by occupation. SALOMON, *supra* note 527, at 232-37. Thus, although Salomon would not permit a state to occupy the land of such tribes outright, the state could achieve the same result by means of a treaty.

687. Such agreements could not be "exhibited as an international title" but could support an otherwise valid title against objections. WESTLAKE, COLLECTED PAPERS, *supra* note 541, at 146; see also Westlake, *Le conflit*, *supra* note 588, at 248, 251-52.

688. LINDLEY, *supra* note 528, at 34-39; BONFILS, *supra* note 528, at 319; 1 CALVO, *supra* note 537, at 410; SALOMON, *supra* note 527, at 217, 219-20.

France abandoned Tibesti between 1916 and 1929, while Chad could claim that Turkey abandoned Tibesti, Borku, and Ennedi in 1912-1913.

Most commentators held that abandonment required both the physical abandonment of possession and the loss of the *animus domini*.⁶⁸⁹ However, unless a state explicitly renounced its desire to possess the territory, others had to infer the loss of *animus domini* from the circumstances.⁶⁹⁰ Except in the case of relatively minor possessions the uncertainty created by such rules generated numerous conflicts.⁶⁹¹

In accordance with the general recognition of the difficulty of establishing an effective occupation immediately, the law allowed states some latitude. In particular, jurists agreed that a temporary loss of possession, such as might result from a native uprising that drove the colonial state's forces from the area, did not imply an abandonment.⁶⁹² However, a withdrawal accompanied by an expressed intention to return later could not prevent an inference of abandonment if a sufficiently long period elapsed without the state's return.⁶⁹³

F. Principles of Islamic Law and the Arguments in Western Sahara

The analysis has focused so far largely on international law as viewed by Western jurists. However, the Aouzou Strip dispute also involves claims based on Islamic principles of international law. Western publicists in the late eighteenth and early nineteenth century generally conceived of a state along strictly European lines: if a political community did not display the full attributes of sovereignty and means of governance possessed by European or

689. See SALOMON, *supra* note 527, at 248; see also 1 FAUCHILLE, *supra* note 526, at 694; JÈZE, *supra* note 527, at 68; LINDLEY, *supra* note 528, at 48; 1 OPPENHEIM, *supra* note 528, at 298. The arbitrator in *Clipperton Island* took this view. Although France had not manifested sovereignty over the island once it had validly acquired it, the arbitrator awarded the island to France because France "never had the *animus* of abandoning the island." 26 AM. J. INT'L L. at 394.

690. LINDLEY, *supra* note 528, at 48; Genêt, *supra* note 527, at 433.

691. The most serious example was the Fashoda Crisis, in which France, arguing that the withdrawal of the British from Sudan during the Mahdist uprising constituted an abandonment, sought to occupy part of Sudan herself. The confrontation between French and British forces at Fashoda in 1898 brought the two countries to the brink of war until France backed down.

692. See 1 FAUCHILLE, *supra* note 526, at 694; see also LINDLEY, *supra* note 528, at 48-49; 1 OPPENHEIM, *supra* note 528, at 299; SALOMON, *supra* note 527, at 338-39; WALKER, *supra* note 619, at 28. Such a temporary withdrawal was not an abandonment because the state preserved its *animus*. JÈZE, *supra* note 527, at 68. The *Delagoa Bay* arbitration applied these principles. Marshal MacMahon, the arbitrator, held that the momentary interruption of Portugal's control over the territory did not imply an abandonment. See LAWRENCE, *supra* note 528, at 149; LAWRENCE 4th, *supra* note 528, at 154-55; WALKER, *supra* note 619, at 29.

693. LINDLEY, *supra* note 528, at 50. In that case, the lapse of time implies a loss of *animus*. The length of time varied according to the circumstances, including: 1) the urgency of the need for governmental control in the area; 2) the degree of control exercised in the area by the rival state; 3) the difficulty of the original possessor's regaining possession or of the rival state's effectively occupying the territory; and 4) the relations that other states had with the area. *Id.* at 51-52.

American states, it was not a state in international law.⁶⁹⁴ Muslim jurists had a quite different perception of sovereignty. So long as the political community practiced Islam, it was part of the Islamic state (or state system). Thus, whereas Western observers would not have deemed a nomadic Muslim tribe to belong to any state, Muslim jurists would certainly have asserted that the tribe belonged to the Islamic state and that its land was consequently not susceptible to lawful appropriation.

1. *Principles of the Islamic Law of Nations*

The Islamic conception of the state derives from the concept of Islam itself. Islam is a compact between each individual and Allah.⁶⁹⁵ The theory of the Islamic state in the nineteenth century was therefore "a human community whose sole true link [was] the Muslim religion."⁶⁹⁶ Islamic law accordingly "had a personal rather than a territorial character and was obligatory upon the Muslims as individuals or as a group, regardless of the territory they resided in."⁶⁹⁷ The Islamic conception of sovereignty thus extended primarily to persons, not territory: "[T]he state's jurisdiction is essentially dependent on the individual's religion which entitles him both to membership in the Muslim brotherhood as well as to citizenship of the Muslim state."⁶⁹⁸

To be sure, Islamic law had a conception of territorial sovereignty: the *Dar al-Islam*, or land of Islam. However, Islamic legal theory defined the *Dar al-Islam* in terms of people: it was the land where Muslims could practice their religion freely.⁶⁹⁹ Accordingly, the extent of the Islamic state was not fixed by rigid boundaries, but expanded and contracted according to the spread or decline of Islam among the people in the territory.⁷⁰⁰

The Islamic state was theoretically a universal one, embracing all Muslims. It was bound by one law and ruled by one ruler.⁷⁰¹ Continuing the tradition of Muhammad's original leadership in both temporal and spiritual matters, the Islamic state was a political and a religious entity at the same time—the community of all believers. The *caliph*, or commander of the faithful, combined the temporal and spiritual leadership of the Muslim community; divine

694. See *supra* notes 584-588 and accompanying text.

695. MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 8-9 (1955) [hereinafter KHADDURI, *WAR AND PEACE*].

696. Maurice Flory, *La notion de territoire arabe et son application au problème du Sahara*, 3 *ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL* 73, 76 (1957).

697. KHADDURI, *WAR AND PEACE*, *supra* note 695, at 45 (citation omitted).

698. *Id.* at 147.

699. *Id.* at 155; Flory, *supra* note 696, at 76; see also Joffé, *supra* note 2, at 27. All other territory was the *Dar al-Harb*, or land of war.

700. Flory, *supra* note 696, at 77-78; I. William Zartman, *Maghrebi Politics and Mediterranean Implications*, in *THE MEDITERRANEAN REGION* 149, 151 (Giacomo Luciani ed., 1984).

701. KHADDURI, *WAR AND PEACE*, *supra* note 695, at 45.

law determined his powers, but he governed as a result of a fictional, second contract with that community.⁷⁰² Thus, for example, as one judge argued in the *Western Sahara* case, the Sultan of Morocco, as the holder of all legislative, executive and spiritual powers, "personified the State," and allegiance to the Sultan was therefore allegiance to the state.⁷⁰³ The *caliph* possessed authority to represent all Muslims in their foreign relations with non-Muslim states, and he could delegate this authority to field commanders and governors whom he appointed.⁷⁰⁴

Under this conception, if the people of the Aouzou Strip were Muslims and recognized the authority of the Ottoman Sultan or his representative in Tripoli, they formed part of the Muslim state. It was not necessary that they submit to the payment of taxes, accept the presence of the Sultan's military forces, or show any other sign that Western law required as a manifestation of sovereignty. As long as they practiced Islam their land was within the *Dar al-Islam*.

2. The Western Sahara Case

In the *Western Sahara* case,⁷⁰⁵ Morocco in particular invoked non-Western legal principles. Morocco made innovative arguments to the I.C.J. concerning sovereignty and state structures that the Western conception of international law had not previously recognized. The U.N. General Assembly had asked the Court for an advisory opinion on the "legal ties" existing between Western Sahara and the State of Morocco and between Western Sahara and the Bilad Shinguitti, or Mauritanian entity. The Court interpreted "legal ties" "as referring to such 'legal ties' as may affect the policy to be followed in the decolonization of Western Sahara."⁷⁰⁶ This interpretation allowed the Court to move away from a Western definition of sovereignty based on the sovereign's ties to the land only, and toward a broader definition that included the sovereign's ties to the people on the land.⁷⁰⁷ Ultimately, however, the Court stopped short of fully embracing Islamic conceptions of sovereignty.

Of the three Islamic states arguing before the Court—Morocco, Algeria,⁷⁰⁸ and Mauritania⁷⁰⁹—Morocco relied most heavily on principles

702. *Id.* at 10-12; ANWAR A. QADRI, *ISLAMIC JURISPRUDENCE IN THE MODERN WORLD* 271, 273 (2d rev. ed. 1973); Joffé, *supra* note 2, at 27; Zartman, *supra* note 700, at 151; *see also* Written Statement of Morocco, 1975 I.C.J. Pleadings (3 Western Sahara) 178-79 (Mar. 27, 1975).

703. *See* Western Sahara, 1975 I.C.J. 12, 83 (Oct. 16) (separate opinion of Judge Ammoun); *see also* QADRI, *supra* note 702, at 272.

704. KHADDURI, *WAR AND PEACE*, *supra* note 695, at 152-53.

705. 1975 I.C.J. 12 (Oct. 16).

706. *Id.* at 41.

707. *Id.* at 40-41.

708. Algeria also advanced innovative arguments, but the Court did not really address them. Algeria first contended that Western Sahara was not *terra nullius* because it was within the *Dar al-Islam*. SHAW, *supra* note 559, at 55. As noted above, however, the Court did not reach this issue, having found that Western Sahara was not *terra nullius* at the time of colonization because the people there were organized

of Islamic law. It requested the Court to consider the personal nature of allegiance in the Moroccan state and the religious significance of the Sultan to Muslims. The Court pronounced itself willing to entertain notions of the state that differed from the traditional model, but it insisted upon proof of a display of political authority. It did not consider the evidence of Moroccan influence in Western Sahara sufficient to support a finding of sovereignty under that standard.

a. Arguments Based on the Special Character of the Moroccan State

Morocco began its argument by urging the Court to reject the Western notion of *terra nullius* that prevailed at the time of colonization. Morocco presented a narrower view of *terra nullius* that would exclude territory when some power exercised sovereignty over it "in the traditional systems of the part of the world in question."⁷¹⁰

It then argued that the Court could appreciate the juridical ties between the Sultanate and Western Sahara only by taking account of the conditions of the Sahara. The European notion of the state did not apply because Morocco

into tribes with chiefs competent to represent them. *Id.* at 81; see also *supra* note 607.

709. Mauritania contended that the Mauritanian entity constituted a distinct cultural entity, and that nomadism, with its patterns of migration and system of allocating to specific tribes rights to certain areas and resources, linked the people with the land in a legal sense. 1975 I.C.J. 12, 57 (Oct. 16); SHAW, *supra* note 559, at 54.

The Court was also willing to consider the special features of the Sahara and the constraints those features imposed on human institutions. It took into account such features as the allocation of migration routes, waterholes, burial grounds, and cultivable areas and pastures. 1975 I.C.J. at 59-60. And although the Court appreciated that "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the need of the community," the Court chose a legal test defining a sovereign entity as one that "possesses, in regard to its Members, rights which it is entitled to ask them to respect" or that is "capable of availing itself of obligations incumbent upon its Members." *Id.* at 63 (quoting *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 178 (Apr. 11)). Under this test the Court found that the Bilad Shinguitti was an "entity" enjoying some form of sovereignty in Western Sahara *Id.* at 63. It had no character distinct from its separate component emirates and tribes. *Id.* The Court did, however, find that some legal ties not rising to the level of sovereignty existed between the Bilad Shinguitti and Western Sahara. *Id.* at 64-65.

No Judge disputed the Court's findings that the Bilad Shinguitti had legal ties but not ties of sovereignty with Western Sahara. Judge DeCastro essentially agreed with the Court's treatment of the Mauritanian claims, arguing that the passage of tribes over land might create a servitude, but not a tie of sovereignty. *Id.* at 164-65 (separate opinion of Judge DeCastro). Judge Ruda, in his dissenting opinion, agreed that the de facto right of each tribe to use certain resources along its route of migration created legal ties, but the independence of each tribe prevented the Bilad Shinguitti from being "a political unity, juridically capable, per se, of being the subject of territorial rights." *Id.* at 176 (dissenting opinion of Judge Ruda).

Some observers have criticized the Court's holding as too general. They argue that the Court should have specified which tribes had legal rights to which parts of Western Sahara. "To transmute nomadic rights over part of a territory to rights possessed by the 'Mauritanian entity' over the whole of the territory in question must be seen as mistaken." SHAW, *supra* note 559, at 54.

Under this precedent the Court would probably not consider the Toubous to have possessed sovereign rights over the territory they inhabited, since the fragmented and anarchic Toubou society was unable to impose obligations on its members, much less avail itself of those obligations.

710. Written Statement of Morocco, 1975 I.C.J. Pleadings (3 Western Sahara) 129 (Mar. 27, 1975).

existed in conditions far different from those prevailing in Europe and had created institutions of government that were appropriate to those conditions.⁷¹¹ In particular, in contrast to the European state founded on territory, the North African state was based on the allegiance of peoples.⁷¹²

Morocco also invoked the Islamic conception of the state with its dual religious and political attributes and its ties of personal allegiance.⁷¹³ The Sultan's religious authority and in particular his sherifian descent (i.e., from Fatimah, the daughter of Muhammad) amplified his temporal power, so that anyone who was a religious subject of the Sultan was *ipso facto* a political subject as well.⁷¹⁴ Since Islam was the one element that unified all people of the Islamic state, allegiance to the Sultan as religious leader necessarily implied allegiance to him as political leader.⁷¹⁵

When viewed in the social and economic environment of the Maghreb, Morocco argued, its ties with Western Sahara amounted to ties of sovereignty.⁷¹⁶ In particular, it contended that the system of ties between the Sultan and individual tribes of Western Sahara, whereby the Sultan appointed a *qa'id* (*caïd*) as an intermediary between the central authority and each tribe, was "perfectly adapted to tribal realities."⁷¹⁷

The Court was willing to accept the first part of this argument, but it did not agree that the Sultan's actions with regard to Western Sahara showed ties of sovereignty. The Court, taking into account the migration and land-use patterns of the nomadic tribes of Western Sahara, acknowledged that the area had "very special characteristics which . . . largely determined the way of life and social and political organization of the peoples inhabiting it," and that the "legal regime" of the region could not be properly understood "without reference to these special characteristics."⁷¹⁸ The Court also expressed its willingness to

take account of the special structure of the Sherifian State. No rule of law . . . requires the structure of a State to follow any particular pattern. . . . At the same time, where sovereignty over territory is claimed, the particular structure of a State

711. Oral Statement of Paul Isoart, Representative of Morocco, 1975 I.C.J. Pleadings (4 Western Sahara) 252, 256-57 (July 2, 1975).

712. *Id.*

713. *Id.* at 259.

714. *Id.* at 261.

715. Oral Statement of Majid Benjelloun, Representative of Morocco, 1975 I.C.J. Pleadings (4 Western Sahara) 189, 193-94 (June 30, 1975). *But see* SHARMA, *supra* note 544, at 190 ("Just because believers of Islam in presently disputed areas owed religious allegiance to the Imam, it did not mean that those territories laid [sic] within the sovereignty of Morocco."); SAYYID ABDU A'LA MAUDUDI, ISLAMIC LAW AND CONSTITUTION 179 (Khurshid Ahmad ed. & trans., 4th ed. 1969) ("As for those Muslims who live outside the territory of the Islamic State, it will not assume their guardianship. The relationship of Islamic brotherhood will be there, but not the legal responsibility of guardianship.")

716. Written Statement of Morocco, 1975 I.C.J. Pleadings (3 Western Sahara) 170 (Mar. 27, 1975).

717. *Id.* at 182; *see also* Oral Statement of Morocco, 1975 I.C.J. Pleadings (4 Western Sahara) 262 (July 2, 1975) (statement of Paul Isoart).

718. 1975 I.C.J. at 41.

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may be a relevant element in appreciating the reality or otherwise of a display of State activity adduced as evidence of that sovereignty.⁷¹⁹

The Court agreed, too, that the sherifian state *was* special. The Court acknowledged the significance of the common bond of Islam and the importance of personal ties of allegiance to the Sultan rather than control over territory.⁷²⁰

Here, however, the Court refused to go further. It stated that religious ties without proof of political allegiance can not give rise to ties of sovereignty: "Such an allegiance . . . , if it is to afford indications of the ruler's sovereignty, must clearly be real and manifested in acts evidencing acceptance of his political authority. Otherwise, there will be no genuine display or exercise of State authority."⁷²¹ For all the Court's professed willingness to consider special conditions and accept non-European models of the state, the Court adhered to the existing dual requirement of the intention to act as sovereign and the display of outward, objectively observable signs of sovereign authority. Special characteristics may demonstrate the existence of non-sovereign legal ties, but they cannot be relevant to a determination of sovereignty.⁷²²

Two Judges disagreed with the Court's decision on this point, arguing that the Court attached insufficient weight to the Sultan's status as both religious and political leader of the Muslim community.⁷²³ Judge Dillard went further, arguing that the Court improperly applied an overly narrow, Western notion of legal ties that required a "sense of obligation." Judge Dillard asserted that such a notion could not apply to the Sahara, where "*modes* of authority [i.e., religious and political] are not sharply delineated and are not part of the consciousness of people."⁷²⁴ In his view, an insistence upon outward, observable signs of sovereignty had no place in the Saharan context, because it would never have entered the people's minds to demand such signs. Instead, the proper test for the existence of authority is "the consciousness of the people"—did they perceive themselves as subject to the sovereignty of the Sultan? Under this view, the Court completely failed to grasp the thrust of Morocco's arguments about the Sultan's dual authority over Muslims.

719. *Id.* at 43-44.

720. *Id.* at 44.

721. *Id.*; *see also id.* at 154 (separate opinion of Judge DeCastro) ("There must be more than a vague *animus possidendi* and 'right of proximity' or the fact of belonging, like Morocco, to the Dar al-Islam."); *id.* at 176 (dissenting opinion of Judge Ruda) ("Sporadic manifestations of allegiance and authority . . . are not sufficient to declare the existence of legal ties, whether of a territorial or personal character."). Judge Ruda went even further, stating that the legal ties of allegiance that the Court did find were not legal ties between the territory and Morocco, but personal ties, so that the Court should have found that there were no legal ties between the territory and Morocco. *Id.* at 175 (dissenting opinion of Judge Ruda). This view implicitly rejects the Court's interpretation of "legal ties." *See supra* note 707 and accompanying text.

722. *See* SHAW, *supra* note 559, at 55.

723. 1975 I.C.J. at 98 (separate opinion of Judge Ammoun), 173 (separate opinion of Judge Boni).

724. *Id.* at 125-26 (separate opinion of Judge Dillard) (emphasis in original).

However, it seems equally if not more likely that the Court understood the Moroccan argument but rejected it. The Court may have felt that reliance upon subjective perceptions of sovereignty would create insurmountable problems of proof. How could a tribunal reliably determine, a century or more after the fact, the perceptions of a people such as the tribes of Western Sahara? Rather than enter this quagmire the Court may have preferred to hold fast to objective signs of sovereignty, which could at least be proved with some degree of certainty before a tribunal.

b. Consideration of the Sultan's Acts in Western Sahara

Having sought to persuade the Court to take into account the special characteristics of Western Sahara and the nature of the sherifian state, Morocco then argued that, under these conditions, the actions of the Sultan with regard to Western Sahara were perfectly adapted to the area and the nature of the sherifian state and thus were sufficient to demonstrate sovereignty in that context.

Morocco focused on the efforts of Sultan Hassan I (1876-1894) and his successors to organize the south of his state against European encroachments. As part of this strategy,⁷²⁵ Morocco argued that Ma al-^cAineen, the leader of a religious brotherhood in Western Sahara similar to the Sanusi, acted as the Sultan's agent in the area. Ma al-^cAineen had founded a nationalist and Pan-Islamic revivalist brotherhood that advocated the unification of all brotherhoods in national resistance to colonial expansion. The brotherhood spread rapidly through the desert. Ma probably enjoyed ties with the Sultan that were as close as or closer than those the Sanusi had with Turkey or the Ottoman officials in Tripoli. His brotherhood cooperated with the Sultan in resisting colonialism, and the tribes of Western Sahara asked Ma to intercede for them with the Sultan to procure modern arms to use against European encroachment.⁷²⁶ According to Morocco, Ma's ties with the Sultan, together with his activities in the desert, extended the Sultan's sovereignty to Western Sahara.⁷²⁷

The Court did not agree. It found the evidence of ties between Ma and the Sultan too inconclusive to support Morocco's claims.⁷²⁸ Spain had argued

725. Morocco also argued that the Sultan's two trips to the region and various economic actions to strengthen the area against European initiatives demonstrated his sovereignty over Western Sahara. Oral Statement of Morocco, 1975 I.C.J. Pleadings (4 Western Sahara) 263-70 (July 2, 1975) (statement of Paul Isoart). The Court found the evidence insufficient to support a finding that these efforts extended as far south as Western Sahara. 1975 I.C.J. at 47-48.

726. Written Statement of Morocco, 1975 I.C.J. Pleadings (3 Western Sahara) 187-94 (Mar. 27, 1975).

727. Oral Statement of Morocco, 1975 I.C.J. Pleadings (4 Western Sahara) 282-83, 286-87 (July 2, 1975) (statement of Paul Isoart).

728. 1975 I.C.J. at 47.

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that Ma and the Sultan cooperated in resisting the European advance because they shared a common interest in keeping the Europeans out, not because Ma was the Sultan's vassal.⁷²⁹ This alternative explanation may have appealed to the Court. It certainly appealed to Judge DeCastro, who felt that Ma cooperated because the arrival of the Europeans would have meant the end of the lucrative slave trade.⁷³⁰ In any event, the Court's rejection of Morocco's argument on this point does not augur well for Libyan claims to the Aouzou Strip based on cooperation between the Ottomans and the Sanusi.

Of critical importance to Morocco's case was the distinction between the two levels of acceptance of the Sultan's administrative authority among the Maghrebi tribes. In the *Bled Makhzen* the tribes fully accepted the Sultan's authority and paid taxes. In the *Bled Siba*, which included Western Sahara, the tribes accepted the Sultan's authority nominally but did not pay taxes. Morocco argued that this distinction was immaterial. The existence of the *Bled Siba* did not represent a challenge to the Sultan's authority, but merely defined the conditions of its exercise. So long as the people of the *Bled Siba* accepted the Sultan as their leader, the specific means by which they showed their allegiance did not matter.⁷³¹

However, in line with its insistence on outward displays of political authority, the Court found the distinction between *Bled Makhzen* and *Bled Siba* extremely relevant. The *Bled Siba*

was not administered by the Makhzen [the Moroccan administrative apparatus]; it did not contribute contingents to the Sherifian army; no taxes were collected there by the Makhzen; the government of the people was in the hands of caïds . . . , and their powers were derived more from the acquiescence of the tribes than from any delegation of authority by the Sultan; even if these local powers did not totally reject any connection with the Sherifian State, in reality they became *de facto* independent powers.⁷³²

Unable to establish any display of political authority, Morocco had to rely on arguments that the Sultan's religious authority necessarily translated into political authority. These arguments could not succeed, given the Court's insistence on objective displays of sovereignty. The most Morocco could establish were legal ties not amounting to sovereignty between certain tribes and the Sultan.⁷³³

The Court's treatment of this issue has important implications for the Aouzou Strip dispute. The conditions of the exercise of the Sultan's power in the *Bled Siba* seem almost identical to the conditions of the exercise of Otto-

729. *See id.* at 46.

730. *Id.* at 159-61 (separate opinion of Judge DeCastro).

731. Written Statement of Morocco, 1975 I.C.J. Pleadings (3 Western Sahara) 179 (Mar. 27, 1975); Oral Statement of Morocco, 1975 I.C.J. Pleadings (4 Western Sahara) 262 (July 2, 1975) (statement of Paul Isoart).

732. 1975 I.C.J. at 44-45.

733. *Id.* at 48-49, 56-57.

man authority among the Toubous. The Toubous neither paid taxes to the Ottoman Sultan nor supplied soldiers to his army. The *Derde*, in the pay of the Ottomans after 1906, seems similar to the *qa'ids*, appointed by the Sultan but holding power previous to and independent of this appointment.⁷³⁴ As with Ma al-'Aineen, the Court's treatment of this issue may foreclose some of Libya's potential arguments regarding the Aouzou Strip.

3. Summary

In arguing its case before the I.C.J., Libya will almost certainly raise claims based on the special nature of the Islamic state and the unique conditions of the Sahara, both of which require consideration of non-Western models of sovereign authority. In particular, Libya will probably seek to invoke the dual spiritual and temporal nature of sovereign authority in the Muslim state. In accordance with that model, it will argue that the Ottoman Sultan, by his claim to the allegiance of the Islamic community and the recognition of that position by the Toubous, necessarily commanded the political allegiance of the Toubous.

The Court announced its willingness to recognize such arguments in *Western Sahara*, but only up to a certain point. In particular, the Court would not accept claims of political authority derived from a position of religious leadership, even among a people who did not necessarily distinguish between such modes of authority. If the Court takes a similar stance in the present dispute, the Libyan case will become much more difficult to establish.

Western Sahara bears directly on the Aouzou Strip dispute in two other respects, neither of which favors Libya. First, in *Western Sahara* the Court considered and rejected claims to sovereignty over an area under the influence of a religious brotherhood that cooperated with the sovereign in resisting colonial expansion. The similarity of this brotherhood to the Sanusiya makes analogy irresistible. If anything, Ma's brotherhood enjoyed closer ties to the sovereign than did the Sanusi. If those arguments did not succeed in *Western Sahara*, claims based on cooperation between the Sanusiya and the Turks are also likely to fail.

Second, the conditions under which the Sultan exercised political authority in the *Bled Siba* are similar to the conditions under which the Ottoman Sultan allegedly exercised authority over the Toubous in Tibesti, Borku, and Ennedi. The Court's conclusion that such conditions fell far short of proving sovereign ties in *Western Sahara* seems to doom in advance any attempt Libya might make to assert that the Ottoman presence in the Aouzou Strip amounted to a display of sovereignty.

734. *Id.* at 45-46,

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However, the Court decided *Western Sahara* over sixteen years ago, and the composition of the Court has changed since then to include a greater proportion of Judges from non-Western states. Perhaps the arguments based on the special conditions of the Sahara and the nature of the Islamic state will prove more persuasive this time. If they do, the Court's decision will have powerful repercussions throughout Africa, crumbling the foundations of *uti possidetis*.

G. State Succession

Through the mechanism of state succession, a state that displaces another state in an area by means of a treaty or a secession inherits all the rights and obligations of the former sovereign. Thus, under the terms of the Treaty of Lausanne, Italy gained in Libya all the former rights and obligations of Turkey, save certain rights retained by Turkey. Similarly, upon its independence Chad succeeded to all of France's rights and obligations in its territory. A successor state generally did not inherit the treaty obligations of the predecessor unless it expressly announced its acceptance of those obligations.⁷³⁵ This principle did not, however, apply to treaty provisions relating to boundaries. In such cases, the treaty stipulations, being local, passed with the territory.⁷³⁶

H. The Principle of *Uti Possidetis*

The principle of *uti possidetis* reaches the same result as and is closely related to the doctrine of state succession. Under *uti possidetis*, former colonies inherit the boundaries they possess at the time of independence.⁷³⁷ The doctrine originated in South America as the former colonies of Spain and Portugal became independent in the nineteenth century,⁷³⁸ and the newly independent African states adopted it in the early 1960s in two fundamental O.A.U. declarations recognizing the inviolability of the former colonial frontiers.

735. MCNAIR, *supra* note 659, at 341.

736. *Id.* at 657; see also SHARMA, *supra* note 544, at 95. The Nigerian scholar A.O. Cukwurah presents a slightly different view leading to the same result. He states that former colonies inherit their boundaries at independence through succession, but not through succession of treaties. A.O. CUKWURAH, *THE SETTLEMENT OF BOUNDARY DISPUTES IN INTERNATIONAL LAW* 106 (1967). He continues, "[u]nlike ordinary contractual arrangements, [boundary agreements] create an objective juridical situation which continues independent of the existence of the original signatory parties," provided that the successor states are linked to the original signatories. *Id.* at 108 (footnote omitted). This argument seems confused. If former colonies inherit boundaries by virtue of gaining independence, and the boundaries are "an objective juridical situation," the insistence upon a link between the former colonial powers and the new states is superfluous.

737. See *Frontier Dispute (Burk. Faso v. Mali)*, 1986 I.C.J. 566 (Dec. 22); CUKWURAH, *supra* note 736, at 112-13; McKeon, *supra* note 651, at 164. The term comes from the Latin phrase *Uti possidetis, Ita possidetis* ("As you possess, so you may possess"). CUKWURAH, *supra* note 736, at 112.

738. See CUKWURAH, *supra* note 736, at 112-13; SHARMA, *supra* note 544, at 303.

1. *From Pan-Africanism to Uti Possidetis*

The O.A.U.'s adoption of *uti possidetis* marked a departure from previous African rhetoric, particularly that of the Pan-African movement. In 1958, at the height of the movement, the All-African People's Congress adopted a resolution that denounced the artificial boundaries drawn by the colonial powers, particularly those that crossed ethnic lines, and called for the abolition of those boundaries. Under the resolution, the true wishes of the people were to guide states in delimiting boundaries.⁷³⁹ Such principles obviously would have led to the redrawing of the map of Africa.

However, experience soon revealed that each state had its own problems and vulnerabilities, and that the constant questioning of state boundaries could prove tremendously divisive and destabilizing.⁷⁴⁰ By 1963 the new African states had executed an abrupt about-face. At an O.A.U. meeting that year, the representative of Mali emphasized the need to "take Africa as it is and . . . renounce any territorial claims. . . . African unity demands of each one of us complete respect for the . . . present frontiers of our respective states."⁷⁴¹ The O.A.U. mediated a settlement to the 1963 boundary dispute between Morocco and Algeria by reliance on *uti possidetis*.⁷⁴² The O.A.U. Charter, adopted at Addis Ababa in the same year, affirmed the principle of "respect for the sovereignty and for the territorial integrity of each State."⁷⁴³ The O.A.U. amplified this principle in a resolution adopted in 1964 at a meeting in Cairo (the Cairo Resolution), declaring that "all the States undertake to respect the boundaries existing at the moment they became independent."⁷⁴⁴

2. *The Burkina Faso-Mali Boundary Dispute*

In a 1987 boundary dispute between Burkina Faso and Mali, a Chamber of the I.C.J. discussed *uti possidetis* at length and made statements favoring a broad application of the principle.⁷⁴⁵ According to the Chamber, "the principle is not a special rule which pertains solely to one specific system of

739. SHAW, *supra* note 559, at 183.

740. See, e.g., SHAW, *supra* note 559, at 183-84 (discussing Moroccan claims to Mauritania and attempted secession of Katanga from Congo); I. WILLIAM ZARTMAN, *THE SAHARA—BRIDGE OR BARRIER?* 48-50 (Carnegie Endowment for Peace Int'l Conciliation Series No. 541, 1963) (discussing Morocco's claims to part of Algeria); Samuel Chime, *The Organization of African Unity and African Boundaries*, in *AFRICAN BOUNDARY PROBLEMS* 65, 69-71 (Carl Gösta Widstrand ed., 1969) (discussing O.A.U. mediation of Morocco-Algeria dispute by application of *uti possidetis*).

741. Quoted in McNAIR, *supra* note 659, at 183-84; see also Chime, *supra* note 740, at 67 (comments of President Tsiranama of Madagascar).

742. Chime, *supra* note 740, at 69-71.

743. O.A.U. Charter, *supra* note 404, art. 3(3).

744. Cairo Resolution, *supra* note 405, para. 2.

745. Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554 (Dec. 22).

international law. It is a general principle, which is logically connected to the phenomenon of the obtaining of independence, wherever it occurs."⁷⁴⁶ The Chamber noted that *uti possidetis* can conflict with the right of self-determination, but harmonized the two principles by referring to the danger to stability from proliferating boundary disputes and stating that *uti possidetis* is often "the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice."⁷⁴⁷ The Chamber concluded, in rejecting any attempt to inject considerations of equity into the dispute, that "[t]hese frontiers, however unsatisfactory they may be, possess the authority of *uti possidetis* and are thus fully in conformity with contemporary international law."⁷⁴⁸

The Chamber then applied the principle of *uti possidetis* to the dispute before it and concluded that the proper boundary between the two states was the one existing in 1959-1960, the time when they achieved independence. In accordance with this conclusion, the Chamber noted that "no legal validity attach[ed] to any subsequent acts of administration" performed by one state in the territory (determined by reference to this boundary line) of the other state.⁷⁴⁹

However, the Chamber did consider the possible effects of a discrepancy between the boundary as drawn in colonial times and the extent of the colonial administration in the disputed territory. The Chamber distinguished four situations. First, where the "reality" of administration "corresponds exactly" to the boundary as drawn, then the reality can only confirm the exercise of the right derived from legal title, i.e., the boundary. Second, where the reality of administration does not correspond exactly to the boundary as drawn, "preference should be given to the holder of the title," i.e., the state to whom the boundary line attributes the territory. Third, where the reality of administration does not co-exist with any legal title, the reality "must invariably be taken into account." Finally, where the legal title is not capable of showing the exact location of the boundary, the realities of administration "can then play an essential role in showing how the title is interpreted in practice."⁷⁵⁰ Under

746. *Id.* at 565. The Court also stated that the rule "must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, . . . but as the application in Africa of a rule of general scope." *Id.*

747. *Id.* at 566-67.

748. *Id.* at 633. Judge Abi-Saab dissented from the rejection of equitable principles in a separate opinion. Under his view a tribunal should apply *uti possidetis* alone only if the tribunal views a line as a series of points between two defined points. However, if the tribunal uses "the common idea of a line as a concrete trace every point of which is specifically identifiable," then it can apply equitable principles *infra legem*, since the boundary line is unlikely to be concretely defined at every point between the endpoints. *Id.* at 662 (separate opinion of Judge Abi-Saab).

749. *Id.* at 570.

750. *Id.* at 586-87.

this scheme the legal title arising from agreements (and, where the same state administered both colonies, from legislation of the colonial state) takes priority over the actual facts of administration, and those facts play a role only as an interpretive aid when the legal title does not yield a precise boundary.⁷⁵¹

3. Importance to the Present Dispute

In general, *uti possidetis* has succeeded in Africa against claims based on historical, ethnic, geographical, or economic considerations, because the adjustment of boundaries based on these other principles threatens to destabilize governments. Chad has invoked the principle of *uti possidetis* in the Aouzou Strip dispute.⁷⁵² The broad application of *uti possidetis* and the analysis developed by the Chamber in the Burkina Faso-Mali dispute favor the Chadian claim, since the 1955 Treaty between France and Libya attributes the Aouzou Strip to Chad.

Libya may undermine that conclusion by establishing the 1955 Treaty as a *diktat* imposed on it by France, but that would only reintroduce the question of the location of Libya's boundaries at the time of independence. It would not prevent the Court from applying *uti possidetis*; that is, it would not stop the Court from seeking to determine the location of the boundary at the time of independence.⁷⁵³ Libya might still be unable to persuade the Court to apply a norm of decolonization.

However, one difference may influence the Court in the present dispute not to give the principles applied by the Chamber the same weight that they enjoyed in the Burkina Faso-Mali case. In that dispute the parties expressly requested the Chamber to determine the boundary solely by reference to *uti possidetis*.⁷⁵⁴ The Application in the present dispute has no such limitations and merely asks the Court to "determine the course of the frontier" between Libya and Chad "in accordance with the principles and rules of international law applicable in the matter as between the parties."⁷⁵⁵ The Court may thus

751. In setting up this system of priorities, the Chamber resolved a dispute over the proper version of *uti possidetis* to apply. Commentators recognized a distinction between *uti possidetis juris*, under which a new state succeeds to all the area attributed by law to the former colonial power, and *uti possidetis de facto*, under which the new state's territory extends to the limits of the area actually administered by the colonial power. See CUKWURAH, *supra* note 736, at 114. The Chamber clearly adopted *uti possidetis juris* as the proper version of the principle.

752. In the memorandum Chad presented to the Security Council in 1983, Chad invoked both the Cairo Resolution and Article 3 of the O.A.U. Charter. *Chad Memorandum*, *supra* note 419, at 67.

753. Indeed, one observer has noted that Libya's occupation of the Aouzou Strip need not be seen as a challenge to *uti possidetis*; Libya could merely be asserting that the boundary at the time of independence lay in a different place. Jean-François Guilhaudis, *Remarques à propos des récents conflits territoriaux entre Etats africains (Bande d'Aouzou, Ogaden, Saillant de Kyaka)*, 22 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 223, 233 (1979).

754. See 1986 I.C.J. at 564-65.

755. Quoted in October 26 Order, *supra* note 516, at 150.

apply other principles, but given its broad statements that *uti possidetis* was a "general principle"⁷⁵⁶ of international law and that colonial boundaries "are fully in conformity with contemporary international law,"⁷⁵⁷ those principles will certainly have to include *uti possidetis*.

I. *The Norm of Decolonization*

The principle of *uti possidetis* would preclude Libya from challenging the boundaries it inherited at independence. Libya could argue, however, that *uti possidetis* should not apply at all and that the Court should instead resolve the dispute by reference to the norm of decolonization. According to this argument the colonial period was an aberration in African history that distorted the historical patterns of interaction among African peoples. Since the agreements by which the colonial powers divided Africa among themselves are illegitimate,⁷⁵⁸ the boundaries that resulted from those agreements are also illegitimate. Any dispute territory should therefore revert to the state or entity that possessed it (or to the successor of such state or entity) immediately before colonization.⁷⁵⁹ The decolonization norm thus stands as the antithesis of *uti possidetis*.

Although the African states rejected decolonization in the 1960s due to the instability it engendered, the principle remains a "fundamental postulate of contemporary international law and relations."⁷⁶⁰ It developed through the League of Nations mandate system, gathered force after World War II, and has been enshrined in several U.N. resolutions.⁷⁶¹ The precedent of the I.C.J. does not offer much guidance on the question of which of these two conflicting principles the Court will apply. In the *Western Sahara* case Morocco and Algeria presented the issue of the applicability of the decolonization norm, but the Court did not reach it.⁷⁶² And although the Chamber of the

756. 1986 I.C.J. at 565.

757. *Id.* at 633.

758. Muller, *supra* note 367, at 177.

759. This argument essentially takes a very strong view of native sovereignty. It maintains that regardless of what European colonists thought, the inhabitants of a territory or their masters possessed rights of sovereignty over the land, and that European occupations were invalid usurpations of that sovereignty. The decolonization argument goes beyond this strong view of native sovereignty, however, because it denies the validity of treaties by which indigenous rulers purported to cede sovereignty. Whereas the proponents of native sovereignty would have permitted states to acquire title by such treaties, the decolonization argument holds that these treaties are invariably void as the products of duress, deceit, or misunderstanding.

760. W. Michael Reisman, *The Struggle for the Falklands*, 93 YALE L.J. 287, 305 n.84 (1983).

761. See *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960); *Declaration of Principles on International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Principles of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8082 (1970).

762. Morocco argued for application of the decolonization norm, contending that Western Sahara had been under the sovereignty of the Sultan of Morocco when Spain illegitimately began colonizing the area,

Court in the 1986 Burkina Faso-Mali boundary dispute made strong statements in support of *uti possidetis*, the parties had directed the Chamber to decide the case exclusively by that principle. Thus the Chamber's statements cannot be read as favoring *uti possidetis* over decolonization.⁷⁶³

Although logically distinct, decolonization is occasionally confused with self-determination, partly because the two principles usually work toward the same end. Occasionally, however, they conflict.⁷⁶⁴ In the instant case, for example, a Libyan decolonization argument would call for the Aouzou Strip to be awarded to Libya as the successor of the Ottoman Empire or the Sanusiya. In contrast, the self-determination principle would have the inhabitants of the region choose whether to associate with Libya, Chad, or neither state. The decolonization argument, if successful, supports claims not only to the Aouzou Strip, but also to most of Chad. The same acts that Libya might claim demonstrated Ottoman or Sanusi sovereignty over the Aouzou Strip encompassed areas well to the south of it. The decolonization norm also logically extends to all of Libya's neighbors. In view of these rather severe potential repercussions, the decolonization norm may not provide the Court with a workable basis from which to fix the boundary.

J. Relevant Principles of the Law of Treaties

While the decolonization norm provides Libya with one means to avoid the application of *uti possidetis*, Libya could also achieve similar results by a second argument. It could claim that the boundary to which it acceded at its independence is not the one specified in the 1955 Treaty. Libya would first need to argue that the 1955 Treaty resulted from duress and is consequently invalid. It could then argue that the 1935 Mussolini-Laval Accords define the true boundary, even though they were never ratified. Evaluating these claims

and that the territory should revert to Morocco. See *supra* notes 710-717 and accompanying text. Algeria took the opposite position, contending that self-determination, not decolonization, should govern the fate of Western Sahara. It urged the Court not to use the intertemporal law to "confer fresh legal life" on a title that preceded Spain's "obsolete or . . . obsolescent" title. See SHAW, *supra* note 559, at 58. The Court did not need to decide whether to apply decolonization to reinstate Morocco's alleged prior title since it found that Morocco had not demonstrated that it possessed title to Western Sahara at the time of colonization. See *supra* notes 728-733 and accompanying text.

Muhammad Bedjaoui, who argued the case for Algeria, has since become a Judge of the Court. In the 1986 Burkina Faso-Mali boundary dispute he joined in the Chamber's broad statements in support of *uti possidetis*, in contrast with the position he argued in *Western Sahara*. However, his position in the Burkina Faso-Mali case may not be a reliable indicator of his perspective on the issue, since the parties there specifically requested the Chamber to decide the dispute on the basis of *uti possidetis*. See *supra* note 754 and accompanying text.

In the years since *Western Sahara* was decided the international political process has resolved the issue whether decolonization or self-determination should apply, as the people of Western Sahara are currently preparing to vote in a United Nations-sponsored plebiscite.

763. See *supra* note 754 and accompanying text.

764. See Reisman, *supra* note 760, at 305-08.

requires an understanding of the law of coercion in treaty formation and of the legal effect of signature and ratification of treaties.

1. *The Law of Coercion in Treaty-Making*

Coercion in the making of a treaty can gravely undermine its applicability. Traditionally, international law left little room for claims of coercion unless one state had threatened the use of force to procure the signature of the other state's representative. As long as the signature, or even the subsequent ratification, was an act of free will, a state could not claim coercion in the actual making of the treaty.⁷⁶⁵ The advent of stronger prohibitions on the use of force since World War I however, has changed this area of law dramatically.⁷⁶⁶ Thirty years ago, Lord McNair wrote that an international tribunal should "scrutinize closely the circumstances in which a treaty or other international engagement was concluded and decline to uphold it in favour of a party which had secured another party's consent by means of the illegal use or threat of force."⁷⁶⁷ However, McNair observed that this principle applied only in actual instances of use or threat of force, and not in cases of unfair bargaining based on economic or financial leverage.

Since then, the law has undoubtedly continued to evolve toward a more expansive interpretation of coercion.⁷⁶⁸ In a recent maritime boundary arbitration between Guinea-Bissau and Senegal, Muhammad Bedjaoui (now a judge on the I.C.J.) displayed a great deal of sympathy to a broad understanding of the term. Judge Bedjaoui's opinion observed the difficulty of inferring acquiescence from the practice of states "crushed by an under-development in all areas." Those states, he argued, do not have the luxury of choice that developed states enjoy, but rather must act more "to assure a precarious survival than to enforce their rights or to create others correctly."⁷⁶⁹ If Libya can establish this point, it may succeed in undermining the validity of the 1955 Treaty or in having it construed *contra stipulatum*. Libya might then be able to inject the Mussolini-Laval Accords back into the discussion.

765. MCNAIR, *supra* note 659, at 207-08; SHARMA, *supra* note 544, at 122.

766. See SHARMA, *supra* note 544, at 122. Claims based not on duress but on inequality of bargaining power enjoy even less favor in the law. As long as the parties expected to conclude binding agreement, writes one commentator, disparities in bargaining power are irrelevant. *Id.* at 120, 122.

767. MCNAIR, *supra* note 659, at 210. The Vienna Convention on the Law of Treaties provides that "[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 52, 1155 U.N.T.S. 331, 344.

768. MCNAIR, *supra* note 659, at 210-11.

769. *Délimitation de la frontière maritime (Guinea-Bissau v. Sen.)* (1989) (dissenting opinion of Muhammad Bedjaoui at para. 70), *annexed to* Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.) (Application of Guinea-Bissau Instituting Proceedings Before the International Court of Justice, August 23, 1989) (on file with author).

2. *The Conclusion, Ratification, and Denunciation of Treaties*

If Libya brings the Mussolini-Laval Accords into the discussion, it will have to surmount an important obstacle: the agreement was never ratified. Under traditional principles of international law this defect alone would doom Libya's attempts. However, under more recent case law, Libya may advance innovative arguments that look to the practice of the parties to determine whether they expected the agreement to have effect notwithstanding their failure to comply with certain formalities.

The international law in force at the time the Mussolini-Laval Accords were signed generally required an exchange of ratification instruments before a treaty could enter into force.⁷⁷⁰ Exchanging instruments was in itself part of the ratification process.⁷⁷¹ According to Lord McNair, "[r]atification is not . . . a mere formality. . . . Ratification has a value which should not be minimized."⁷⁷² The ratification requirement allows the competent authorities to review the agreement with a thoroughness that is unavailable to the negotiators, and to ensure that the treaty conforms to the negotiator's instructions.⁷⁷³ Although state practice by 1935 may have been moving away from requiring ratification exchanges in every case,⁷⁷⁴ the terms of the Treaty of Rome (the part of the Mussolini-Laval Accords that actually purported to cede the Aouzou Strip to Italy), expressly required it.⁷⁷⁵ The failure to exchange the instruments thus prevented the Treaty of Rome from becoming effective.

Nevertheless, Libya could argue that France's signature and ratification sufficiently demonstrated its satisfaction with the agreement. With the legislative review function satisfied, perhaps the actual exchange of instruments was unnecessary. Such an argument would, in effect, call for an extension of the law beyond its current state, but recent case law provides some authority for such an extension. In the maritime boundary arbitration between Guinea-Bissau and Senegal, the arbitral tribunal held that the failure to perform certain formalities required by domestic law did not bar the entry into force of a treaty where the other party fully expected the treaty to be honored. Guinea-Bissau sought to nullify an exchange of letters between France and Portugal that had

770. See MCNAIR, *supra* note 659, at 132 ("Today . . . it is the exchange of ratifications which concludes the treaty and gives effect to it.").

771. *Id.* at 136-37.

772. *Id.* at 133.

773. *Id.* at 133; see also *Ambatielos (Jurisdiction) (Greece v. U.K.)*, 1953 I.C.J. 28, 69 (July 1) (dissenting opinion of Judge Basdevant) ("The drafting and signature of an international agreement are the acts by means of which the will of the contracting States is expressed; ratification is the act by which the will so expressed is confirmed by the competent authority, for the purpose of giving it binding force.").

774. See MCNAIR, *supra* note 659, at 133.

775. "The present Treaty will be ratified and the ratifications will be exchanged within the shortest period possible. It will enter into force the day of the exchange of ratifications." Mussolini-Laval Accords, *supra* note 898, art. 7, 49 *Trattati e Convenzioni* (Italy) at 19.

not been approved by the Portuguese national assembly as constitutionally required.⁷⁷⁶ Senegal argued that the agreement was valid despite the procedural defects, since Portugal had approved it according to the "ensemble of customs and practices that have palpably altered" constitutional meaning.⁷⁷⁷ The arbitral tribunal agreed with Senegal, noting that Portugal had been under an authoritarian regime that frequently sidestepped the national assembly in entering international agreements, including, for instance, the U.N. Charter. This custom effectively created a quasi-constitutional practice, and as long as France had believed, under the circumstances, that the accord was valid, the agreement would bind Portugal and its successor, Guinea-Bissau.⁷⁷⁸

However, that reasoning may not apply in the present case. Because the exchange of ratifications is intended precisely to assure each side that the other intends to honor its commitments, the failure to effect an exchange may weigh much more heavily against the validity of a treaty than the failure to comply with domestic requirements.

The Mussolini-Laval Accords also raise issues of the legal effect of denunciation because Italy denounced the Accords in 1938. Would its denunciation have to be given effect? Under the contemporary law of treaties, the terms of a treaty might imply a right to terminate the agreement. The existence of the implied right depends on the intent of the parties, as inferred from the circumstances surrounding the conclusion of the treaty, the terms of the agreement, and the nature of the subject matter.⁷⁷⁹

Finally, if Libya does attempt to rely on the Mussolini-Laval Accords, Chad may raise questions about the failure to fulfill an implied condition—namely, the failure to conclude the convention on nationality in Tunisia. The Mussolini-Laval Accords contemplated that this convention would enter into force on the same date as the Treaty of Rome. Under the system of classification developed by Lord McNair in his work on the law of treaties, the conclusion of the Tunisian convention would operate as a condition for operation of the Treaty of Rome.⁷⁸⁰

776. *Délimitation de la frontière maritime* (Guinea-Bissau v. Sen.) ¶ 53 (1989), *annexed to* Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.) (Application of Guinea-Bissau Instituting Proceedings Before the International Court of Justice, Aug. 23, 1989) (on file with author).

777. *Id.*

778. *Id.* ¶ 59. The tribunal also held that the failure to publish the agreement in Portugal did not affect the applicability of the accord, since Guinea-Bissau had received notice of the agreement through other means. The arbitral panel further ruled that the failure to register the accord with the United Nations did not render it inapplicable, since the tribunal was not a U.N. body. *Id.* ¶¶ 69-78. On a subsequent appeal based upon matters of arbitral procedure, the I.C.J. upheld the award. Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), 1991 I.C.J. 53 (Nov. 12), *reprinted in* 31 I.L.M. 32 (1992).

779. MCNAIR, *supra* note 659, at 511.

780. *See id.* at 436-37.

K. Conclusion

The applicable legal principles in the Aouzou Strip are clearly complex, and each side can amass many of them to support its claims. The dispute gains additional complexity from the potential conflict between Western and non-Western standards of sovereignty. The next part of this article analyzes the arguments of Libya and Chad in light of the legal principles developed above, keeping in mind the tension between competing bodies of law. As part VI concludes, the degree to which the Court entertains arguments based on non-Western principles will have an enormous influence on the outcome of the dispute, as well as on the development of the law in general.

V. ANALYSIS OF THE CHADIAN AND LIBYAN CLAIMS

Chad's claims to the Aouzou Strip rest on a series of agreements, concluded by France with various other colonial powers between 1890 and 1924, that purported to reserve northern Chad (including the Aouzou Strip) to France. In 1955 France negotiated a treaty with Libya in which Libya agreed that its southern boundary would be the line drawn by those colonial agreements. Chad acceded to that boundary upon its independence in 1960. *Prima facie*, the 1955 Treaty provides strong support for Chad's case. Explicit boundary determinations generally provide the best evidence of the location of the boundary since they indicate the intention of the parties.⁷⁸¹

Consequently, if Libya is to claim territory that it agreed in 1955 would belong to Chad, it must attack the 1955 treaty as invalid. Libya will most likely argue, as it has in the past, that the agreement was a product of coercion. If it succeeds Libya would then have to supply some other basis to support its version of the boundary. It could argue that other agreements—the alleged cession of 1972, or the 1935 Mussolini-Laval Accords—defined the boundary between Chad and Libya. These treaties, however, are not especially strong bases on which to build a claim of a title. Libya will therefore most likely have to resort to arguments based on occupation and other methods of acquiring territory.⁷⁸² It could argue that France's occupation of the region was insufficient as a matter of law, or that it was illegal because the area was not open to occupation. Although these claims may not have much merit under traditional principles of international law, they carry more force if viewed under legal concepts appropriate to the geographical and social milieu of the Sahara.

781. See SHARMA, *supra* note 544, at 93.

782. See *id.* at 94 ("if there are no explicit agreements determining the boundary, . . . the decision-makers must turn to . . . legal policies relevant to traditional and contemporary rules about 'title' to territory.").

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Section A below sets forth the Chadian claims based on the 1955 treaty and the colonial agreements upon which it drew to delimit the boundary. Section B then discusses the arguments Libya might use to undermine the validity of the 1955 agreement. Section C considers Libya's treaty-based claims to the region, concluding that they ultimately fail. Sections D and E then examine Libya's potential arguments attacking the French occupation and claiming title through the Ottoman Empire or the Sanusiya.

A. Chad's Treaty-Based Claims

1. *The 1955 Treaty of Friendship and Good Neighborliness*

Chad's treaty-based arguments arise primarily from the Treaty of Friendship and Good Neighborliness (1955 Treaty) negotiated by France with the newly independent United Kingdom of Libya in 1955.⁷⁸³ Article 3 of the 1955 Treaty fixes the boundaries of Libya with French possessions, including French Equatorial Africa, the colony from which Chad emerged as an independent state in 1960. The treaty does not refer directly to any landmarks or draw any lines on maps. Instead, it stipulates that the frontiers "will be those which result from the international acts in force on the date of the constitution of the United Kingdom of Libya, such as they are defined in the exchange of letters attached hereto (Annex I)."⁷⁸⁴

The accompanying exchange of notes recites the language of Article 3 and lists a series of agreements between France and various other colonial powers. The Chadian argument thus derives from a series of accords made by France between 1898 and 1919 to fix the boundaries of French colonial possessions in Africa.⁷⁸⁵ Consequently, an evaluation of the strength of this argument requires an examination of the terms and validity of those agreements.

2. *The 1898 and 1899 Sphere of Influence Treaties and the 1902 Barrère-Prinetti Letters*

On August 5, 1890, France signed a declaration with Great Britain allowing France's Mediterranean possessions to extend southward to Lake

783. 1955 Treaty, *supra* note 401, reprinted in BROWNLIE, *supra* note 12, at 30. Because the treaty envisaged a withdrawal of French troops from Fazzan, France very nearly did not ratify it. See L'ANNE, *supra* note 11, at 214-15; Muller, *supra* note 367, at 175. Ultimately, however, the instruments of ratification were exchanged on February 20, 1957. BROWNLIE, *supra* note 12, at 30.

784. 1955 Treaty, *supra* note 401, art. 3, reprinted in BROWNLIE, *supra* note 12, at 31.

785. Significantly, the list does not include the 1935 Laval-Mussolini Accords. See *id.* annex I, reprinted in BROWNLIE, *supra* note 12, at 32-33.

Chad.⁷⁸⁶ A later agreement with Germany in 1894 delimited the frontiers of Cameroon and also assured France of a corridor connecting its Mediterranean colonies with its central African territories.⁷⁸⁷

France began to define the eastern and northern frontiers of this corridor, which was later to become Chad, by signing a convention with Great Britain in 1898 (1898 Convention).⁷⁸⁸ In this agreement, the first listed in the exchange of notes annexed to the 1955 Treaty, Great Britain agreed to refrain from any action in a French sphere of influence comprising "the northern, eastern, and southern shores of Lake Chad." The agreement did not, however, indicate the precise extent of territory within the sphere.⁷⁸⁹ In concluding the agreement the parties sought primarily to demarcate clearly the frontiers separating the colonies of the two nations located farther to the south. The vagueness of the division around Lake Chad attests to the limited extent of exploration in that region at the time.

The following year France and Great Britain felt it expedient to delimit their spheres of influence in the region more precisely. The immediate impetus for this decision was the ignominious end of the Marchand expedition, a French attempt to challenge English claims to the Upper Nile. The crisis that ensued when this expedition confronted British forces at Fashoda resulted in a major colonial setback for France. Théophile Delcassé, the French Minister of Foreign Affairs, opted to end France's colonial rivalry with Britain and abandon French claims to the Upper Nile, rather than lose a potential ally against Germany.⁷⁹⁰ Consequently, on March 21, 1899, Great Britain and France signed a declaration (1899 Declaration) to supplement the 1898 Convention.⁷⁹¹ This declaration, the second agreement listed in the annex to the 1955 Treaty, set out principles for determining the western border of the province of Darfur (in present-day Sudan) with neighboring French possessions, and then proceeded to state:

786. Declarations Respecting Territories in Africa, Aug. 5, 1890, Gr. Brit.-Fr., 173 Consol. T.S. 377.

787. Convention for the Delimitation of French Congo and the Cameroons and of Respective Zones of Influence in the Region of Lake Chad, Mar. 15, 1894, Fr.-Ger., 180 Consol. T.S. 75.

788. Convention for Delimitation of Possessions West of the Niger, June 14, 1898, U.K.-Fr., 186 Consol. T.S. 313 [hereinafter 1898 Convention]. Instruments of ratification were exchanged on June 13, 1899. BROWNIE, *supra* note 12, at 619.

789. 1898 Convention, *supra* note 788, art. IV, 186 Consol. T.S. at 320.

790. LANE, *supra* note 11, at 17. The decision not to challenge Great Britain in the Nile basin did not please French colonialists. One of the most prominent, Robert de Caix, criticized Delcassé's policy in an article discussing the 1899 Declaration. See Robert de Caix, *La convention franco-anglaise*, 9 B.C.A.F. 100, 100-05 (1899) [hereinafter de Caix, *La convention*]. De Caix proceeded to minimize the importance of the attribution of Borku and Tibesti to France, stating that "they are not noteworthy lands" and that the government's attempt to portray them as major gains was essentially a smokescreen "to deceive [the public] as to the mediocre character of the agreement." *Id.* at 103.

791. Declaration Completing Convention of June 14, 1898, Mar. 21, 1899, U.K.-Fr., 186 Consol. T.S. 331 [hereinafter 1899 Declaration]. The instruments of ratification were exchanged on June 13, 1899. BROWNIE, *supra* note 12, at 622.

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It is understood, in principle, that to the north of the 15th parallel the French zone shall be limited to the north-east and east by a line which shall start from the point of intersection of the Tropic of Cancer with the 16th degree of longitude east of Greenwich . . . , shall run thence to the south-east until it meets the 24th degree of longitude east of Greenwich . . . , and shall then follow the 24th degree until it meets . . . the frontier of Darfur as it shall eventually be fixed.⁷⁹²

The parties then agreed to appoint a commission "to delimit on the spot a frontier-line."⁷⁹³ Remarkably, the 1899 Declaration did not specify where the northern limit of France's zone would intersect the twenty-fourth meridian. This point will be discussed in more detail shortly.⁷⁹⁴

a. *Legitimacy of the Delimitation of Zones of Influence*

The line drawn by the 1899 Declaration sets out the foundation for the Chadian claim to the Aouzou Strip. The 1898 Convention and the 1899 Declaration raise some questions, however, and some scrutiny of the agreements is consequently required. The first question concerns Britain's authority to negotiate the northern boundary of French possessions. At that time Britain possessed, as part of Egypt and Sudan, a large part of what is now southeastern Libya, extending as far west as the sixteenth degree of longitude.⁷⁹⁵ But Britain's possession of the land east of the sixteenth meridian did not entitle it to negotiate a limit to French possessions west of that line. That territory was part of the Turkish *sancak* of Fazzan, attached to Tripolitania, so that Turkey, not Britain, would have been the appropriate counterparty to delimit ownership of the land.

However, Britain and France did not intend these treaties to settle the ownership question. The treaties therefore did not create a title that was valid *erga omnes*. Rather, the parties each pledged to refrain from any action in the other's zone that might impede the other party's acquisition of sovereignty.⁷⁹⁶ By delimiting a French sphere of influence, Britain was not negotiating away

792. 1899 Declaration, *supra* note 791, art. 3, 186 Consol. T.S. at 332-33.

793. *Id.* art. 4, 186 Consol. T.S. at 333. The 1899 Declaration did not specify the boundary to the west of the Tropic of Cancer. However, the map annexed to the agreement allegedly showed the frontier descending southwest from the point of intersection of the Tropic of Cancer with 16° East to the town of Tummo. (There is some dispute as to whether a map was actually annexed at all to the declaration. *See infra* notes 812-815 and accompanying text.) Neither party subsequently challenged this part of the boundary. LANNE, *supra* note 11, at 21.

794. *See infra* notes 821-824 and accompanying text.

795. *See* LANNE, *supra* note 11, at 21-22, 246. The territory of Cyrenaica, a Turkish possession, did not extend far south of the coast. In 1934 Britain recognized Italian sovereignty over the southeastern part of this piece of land, known as the Sarrah Triangle. *See infra* notes 833-836 and accompanying text. From 1899, the date of an agreement between Great Britain and Egypt, until 1934, the Sarrah Triangle was considered to be part of the Anglo-Egyptian Sudan. *See, e.g.,* Shaw, *supra* note 269, at 51; *cf.* FERRANDI, *supra* note 18, at 2 *bis* (boundary indicated on map showing European colonial possessions in northern Africa and routes of access to Lake Chad).

796. 1898 Convention, *supra* note 788, art. VII, 186 Consol. T.S. at 321-2.

Turkish territory; it merely promised France to stay out of that area. In order to gain internationally valid title to the territory, France still had to occupy it⁷⁹⁷ or conclude treaties with "the native Chiefs."⁷⁹⁸

If, however, Turkey possessed sovereignty over the zone attributed to France, then France could not acquire any sovereign rights there absent some legally recognized means such as cession, prescription, or conquest.⁷⁹⁹ Furthermore, if Turkey had rights in the French zone that did not rise to sovereignty, the agreements with Great Britain, standing alone, could not confer a superior right on France.⁸⁰⁰ The Court may agree with Libya that, given the special characteristics of the region and the nature of the Ottoman state, Turkey possessed such rights at the time France concluded its treaties. Moreover, before France occupied the region, Turkey (which was not bound by the Anglo-French agreements) had induced *Derde Chai* to accept an Ottoman stipend and an appointment as *kaymakam*. These arrangements would prevail over any right France could claim by virtue of its agreements with Britain.⁸⁰¹ France, however, never infringed upon Turkey's rights, but instead waited to occupy the region until Turkey had renounced its rights to it.

b. *Legitimacy Notwithstanding Failure to Specify Ownership*

A second question raised by the 1899 Declaration concerns the choice of the language "the French zone shall be limited." The declaration omits mention of the ownership of the territory on the other side of the line.⁸⁰² Delcassé apparently insisted on the vague phrasing because he did not feel comfortable with acknowledging the *fait accompli* that brought Britain sole control of Egypt in 1882.⁸⁰³ He also wished to avoid alarming Italy, which had designs on

797. See *supra* note 528 and accompanying text.

798. 1898 Convention, *supra* note 788, art. VI, 186 Consol. T.S. at 321.

799. For a discussion of this point, see *supra* note 661 and accompanying text.

800. See Despagne, *supra* note 556, at 117-18 (stating that existing rights of other states in sphere of influence and even irregular treaties with native chiefs trump over "claims of a country that can only point to the hinterland conceded to it by another State, and who can't even raise its flag above the regions claimed by it").

801. French colonialists acknowledged this situation even in 1911, recognizing that in light of the requirement of effective occupation, the Turkish actions would "make [France's] negotiations with Constantinople more difficult." De Caix, *supra* note 790, at 91.

802. 1899 Declaration, *supra* note 791, art. 3, 186 Consol. T.S. at 332-3.

803. Letter from Théophile Delcassé, Minister of Foreign Affairs, to Paul Cambon, French Ambassador to Great Britain (Mar. 7, 1899), in FRANCE, MINISTÈRE DES AFFAIRES ÉTRANGÈRES, DOCUMENTS DIPLOMATIQUES: CORRESPONDANCE CONCERNANT LA DÉCLARATION ADDITIONNELLE DU 21 MARS 1899 À LA CONVENTION FRANCO-ANGLAISE DU 14 JUIN 1898, No. 11, at 15 (Paris, Imprimerie Nationale 1899) [hereinafter CORRESPONDANCE]; L'ANNE, *supra* note 11, at 18 n.8, 19; see also *Chronique des faits internationaux*, 6 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 302, 310-12 (1899) [hereinafter *Chronique*].

Tripolitania.⁸⁰⁴ Again, any objection based on this vague language misunderstands the nature of a sphere of influence treaty. Because such treaties could not determine ownership, they did not need to specify what state, if any, currently exercised actual sovereignty over the territory in each state's sphere. Indeed, states could create spheres of influence within other states.⁸⁰⁵ Consequently, the failure of the 1899 Declaration to specify the ownership of the territory beyond the French sphere has no bearing on the validity of the agreement.

c. French Attempts to Mollify Italy

In order to mollify Italian fears about French intentions, France reached an agreement with Italy in 1900 to limit French expansion toward Tripoli in exchange for Italy's promise not to interfere with France's attempts to acquire Morocco.⁸⁰⁶ Two years later France gave more formal assurances in an exchange of letters dated November 1, 1902 (Barrère-Prinetti Letters).⁸⁰⁷ In these letters, the third relevant agreement listed by the 1955 Treaty, France and Italy agreed that "the limit of French expansion in northern Africa [would be] the frontier of Tripolitania indicated on the map annexed to the declaration of March 21, 1899, additional to the Franco-English Convention of June 14, 1898."⁸⁰⁸ Both governments agreed that the exchange of letters fully settled their interests in the Mediterranean.⁸⁰⁹ By restricting French expansion to

804. LANE, *supra* note 11, at 19; see also WILLIAM C. ASKEW, EUROPE AND ITALY'S ACQUISITION OF LIBYA, 1911-1912, at 19 (1942) (discussing Franco-Italian relations in late 1890s); E. ROUARD DE CARD, ACCORDS SECRETS ENTRE LA FRANCE ET L'ITALIE CONCERNANT LE MAROC ET LA LYBIE 25-26 (1921) [hereinafter ROUARD DE CARD, ACCORDS SECRETS].

805. European states did exactly that in China. The state gaining such a sphere of influence did not, however, gain title to that territory, since it was already under the sovereignty of another state. See *supra* notes 580-581 and accompanying text.

806. Exchange of Notes, Dec. 14-Dec. 16, 1900, Fr.-It., 189 Consol. T.S. 147; see BROWNIE, *supra* note 12, at 624-26; PICHON, *supra* note 161, at 82-83.

807. ROUARD DE CARD, ACCORDS SECRETS, *supra* note 804, at 27; see also ROUARD DE CARD, LE DIFFÉREND, *supra* note 357, at 20-22. The letters, which also embodied agreements gravely weakening Italy's commitment to the Triple Alliance, were actually exchanged in secret on July 10 but were post-dated to November 1 in order to avoid embarrassing Italy, which had recently renewed the Triple Alliance. The French, fearing the death of one of the Italian signatories before November, caused two copies to be executed: one dated July 10, the other dated November 1. On November 1 the first copy was to be destroyed. See BROWNIE, *supra* note 12, at 623-36.

808. Exchange of Notes, Nov. 1, 1902, Fr.-Italy, 192 Consol. T.S. 155 [hereinafter Barrère-Prinetti Letters]. The parties inserted the reference to the map annexed to the 1899 Declaration on Italy's suggestion. Telegram from Ambassador Barrère to Théophile Delcassé, Minister of Foreign Affairs (June 28, 1902), in 2 D.D.F. (ser. 2) No. 310, at 373 (1931).

809. Barrère-Prinetti Letters, *supra* note 808, 192 Consol. T.S. at 155-7. After 1915 Italian writers attacked the Barrère-Prinetti Letters on three grounds: first, they were void as a product of the old "secret diplomacy;" second, they referred only to the section of the boundary between Ghat and Tummo but not to the section east of Tummo; and third, the Treaty of London cancelled them. Shaw, *supra* note 269, at 52.

the area south of the line drawn in 1899, Italy necessarily agreed that France could attempt to acquire sovereignty as far north as the line.⁸¹⁰

After World War I, Italy implicitly acknowledged France's rights to the area south of the line. Italy claimed that Article 13 of the Treaty of London superseded the Barrère-Prinetti Letters by entitling Italy to claim additional colonial compensations at the expense of France and Great Britain in Africa.⁸¹¹ If the Treaty of London did supersede the exchange of letters in 1915, then Italy's argument implies a recognition that the Barrère-Prinetti Letters conferred on France a right to acquire sovereign rights, at least as against Italy, in the area south of the 1899 line.

d. *The Question of the Map Annexed to the 1899 Declaration*

The Barrère-Prinetti Letters may have eliminated some problems between France and Italy in 1902, but today they draw attention to a third problem with the 1899 Declaration. The letters refer to "the map annexed to the declaration of March 21, 1899." "Surprisingly," says one observer, "no map was included with the 1899 convention document—although the 1902 exchange of notes suggests there was such a map. If it did exist, it has never been found."⁸¹² Others have disputed this claim, reasoning that there must have been a map because the Barrère-Prinetti Letters referred to it.⁸¹³ Bernard Lanne claims that the *Bulletin du Comité de l'Afrique française* published the map in 1899.⁸¹⁴ The map published there shows the northern frontier of the French possessions descending more sharply to the south than the present boundary, meeting the twenty-fourth meridian at approximately 18°45', rather than 19°30', North latitude.⁸¹⁵ Significantly, however, the map does keep territories marked Tibesti, Borku, and Ennedi within the French zone, even though

810. Some have argued that the Barrère-Prinetti Accord precluded Italy from asserting the full extent of the rights it gained from Turkey in 1912, including the Turkish hinterland claims. McKeon, *supra* note 651, at 161. That argument, however, is not strictly correct. Italy did not agree in 1902 to renounce any claims to the area south of the 1899 line. It merely acknowledged that France could attempt to acquire sovereignty south of the line.

811. See CANTALUPO, *supra* note 357, at 259.

812. Joffé, *supra* note 2, at 133; see also Shaw, *supra* note 269, at 51.

813. As noted above, the parties chose to use the map at Italy's suggestion. See *supra* note 808. However, the French diplomatic correspondence does not indicate what caused Italy to make this suggestion.

814. LANE, *supra* note 11, at 21.

815. See de Caix, *La convention*, *supra* note 790, at 101. For the identical map, see ROUARD DE CARD, *LE DIFFÉREND*, *supra* note 357, at 15; E. ROUARD DE CARD, *TRAITÉS DE DÉLIMITATION CONCERNANT L'AFRIQUE FRANÇAISE 114 bis* (1910); *Chronique*, *supra* note 803, at 311. The map is reproduced as Map 9. See Map 10 for a presentation of versions of the boundary drawn by Great Britain.

Coincidentally, the 1935 treaty on which Libya relies also places the point of intersection at 24° East, 18°45' North. The line claimed by Libya, however, approaches this point from a slightly different angle. See Map 11.

the line as drawn would actually leave portions of these regions north of the line.

Chad included an alleged reproduction of the map annexed to the agreement in a memorandum accompanying its 1983 complaint to the U.N. Security Council.⁸¹⁶ That map, however, was actually published in 1899 by the French Ministry of Foreign Affairs in a "Yellow Book" on the 1899 Declaration.⁸¹⁷ It shows the northern limit of the French zone intersecting the twenty-fourth meridian at approximately 18°52' North.⁸¹⁸

Most likely, no map actually accompanied the original text of the 1899 Declaration. No copy of the agreement has been found with a map annexed. The agreement itself does not even refer to a map;⁸¹⁹ no map was even mentioned until 1902. Italy, who first suggested including the reference to the map in the Barrère-Prinetti Accord, may very well have been referring to the map published in the French Yellow Book, believing it to be a copy of an official map annexed to the treaty rather than a mere interpretive guide to the 1898 and 1899 agreements. At the very least Chad could argue that Italy in 1902 could not have been unaware of France's interpretation of the 1899 line as published in the Yellow Book, since that document was an official publication of the French Ministry of Foreign Affairs.⁸²⁰

e. Discrepancy Between Treaty Language and Later Practice

The fourth and most significant fourth question raised by the 1899 Declaration concerns the vagueness of the line in the absence of a map, and the divergence of the line described in the 1899 Declaration from the frontier in actual practice. The declaration specified that the line was to run "to the south-east" from the Tropic of Cancer until it intersected 24° East longitude, but it did not specify a point of intersection.⁸²¹ However, the history of the negotiations reveals that both parties intended to place within the French zone "all the

816. *Chad Memorandum*, *supra* note 419, at 72. For a copy of the map, see Map 8.

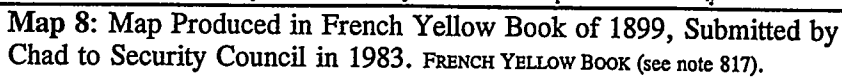
817. See FRANCE, MINISTÈRE DES AFFAIRES ÉTRANGÈRES, DOCUMENTS DIPLOMATIQUES: DÉCLARATION ADDITIONNELLE DU 21 MARS 1899 À LA CONVENTION FRANCO-ANGLAISE DU 14 JUIN 1898 (Paris, Imprimerie Nationale 1899) [hereinafter FRENCH YELLOW BOOK].

818. The French writer Pichon incorrectly stated that the point of intersection on this map occurred at 24° East, 19°30' North. PICHON, *supra* note 161, at 56, 187.

819. In another odd twist, although the 1898 Convention speaks of two annexed maps, only one map accompanied the text of the agreement, *Id.* at 187.

820. See *id.* at 88, 190. On the other hand, the British Foreign Office put the point of intersection with 24° East near 18° North. *Id.* at 187.

821. 1899 Declaration, *supra* note 791, art. 3, 186 Consol. T.S. at 332-3. The French text reads "dans la direction du sud-est." L'ANNE, *supra* note 11, at 20. A note published by the French Ministry of Foreign Affairs describing the terms of the agreement was equally vague, stating that the line was to run "in the direction of the south-east until it meets 24° East longitude." See *L'Arrangement*, *supra* note 260, at 145-46.



territory forming the oases of Tibesti, Borku, . . . and Ennedi.⁸²² The boundary as recognized in practice by France and Britain, and as claimed by Chad, actually runs east by southeast, intersecting 24° East at 19°30' North latitude. This line keeps Tibesti, Borku, and Ennedi in the French zone. A line running due south-east, according to a literal reading of the declaration, would intersect 24° East south of 16° North. Such a boundary would, contrary to the parties' intentions, leave parts of Tibesti and Borku and much of Ennedi outside the French zone.⁸²³ Most maps published at the time of the agreement show the intersection at 18°45' North latitude, which is neither strictly southeast nor as far north as Chad claims.⁸²⁴

3. *Later Treaties Clarifying the Boundary*

Although the 1899 Declaration only vaguely defined the limits of the French sphere of influence, later agreements from the colonial period gave a more precise indication of the boundary. These agreements are also problematic, however, in that they might have purported to modify retrospectively the agreement that France had reached with Italy in 1902.

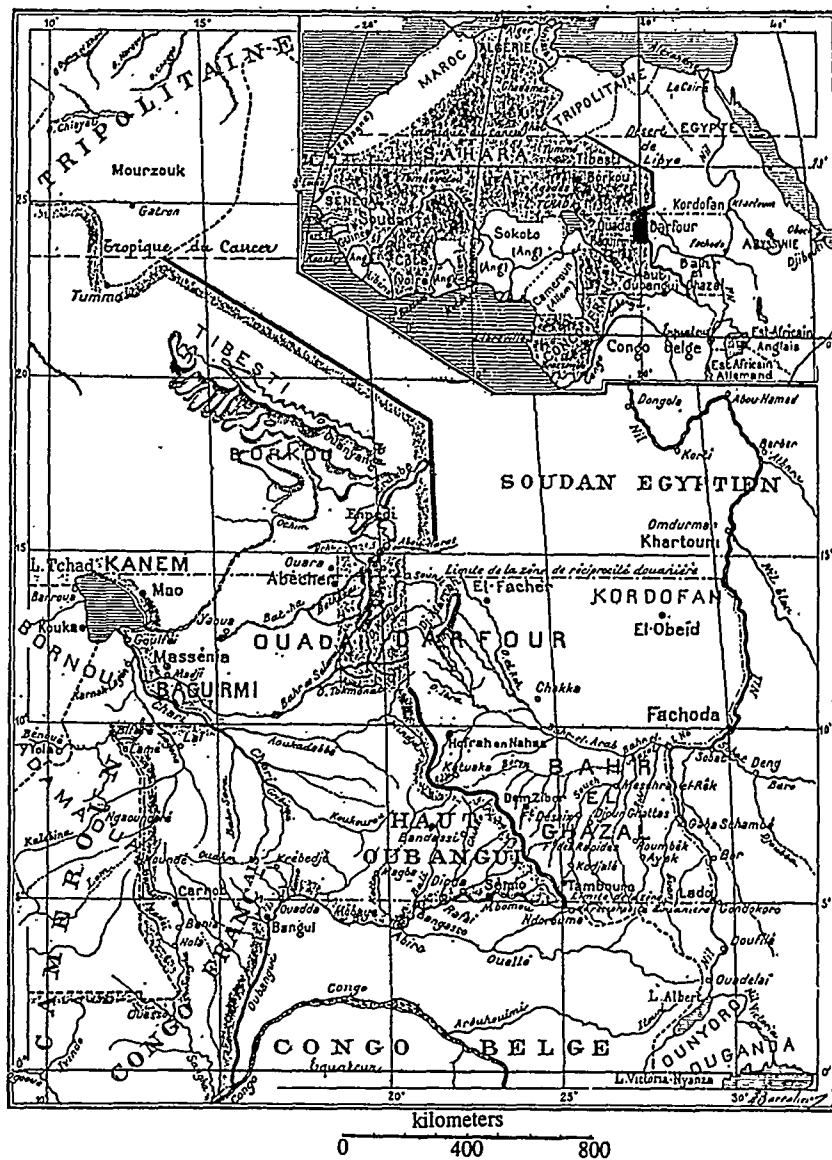
a. *The 1919 Convention and the 1924 Protocol*

Seeking to rectify the problems arising from a literal interpretation of "southeast" in the 1899 Declaration, France seized the opportunity when the time finally came to fix the boundary between the French possessions and Sudan more definitely, as foreseen in the 1899 Declaration. In 1919 France and Great Britain concluded a convention (1919 Convention) that supplemented

822. LANNE, *supra* note 11, at 18. For some of the discussions on this point see Dispatch from Paul Cambon, French Ambassador to Great Britain, to Théophile Delcassé, Minister of Foreign Affairs (Jan. 21, 1899), in 15 D.D.F. (ser. 1) No. 38, at 61-62 (1959); Letter from Théophile Delcassé, Minister of Foreign Affairs, to Paul Cambon, French Ambassador to Great Britain (Feb. 10, 1899), in CORRESPONDANCE, *supra* note 803, No. 6, at 10 (insisting on "whole of Tibesti and Borku and all the oases that depend on them"); Dispatch from Paul Cambon, French Ambassador to Great Britain, to Théophile Delcassé, Minister of Foreign Affairs (Feb. 16, 1899), in 15 D.D.F. (ser. 1) No. 84, at 136-37 (1959); Telegram from Théophile Delcassé, Minister of Foreign Affairs, to Paul Cambon, French Ambassador to Great Britain (Feb. 21, 1899), in 15 D.D.F. (ser. 1) No. 87, at 141 (1959); Dispatch from Paul Cambon, French Ambassador to Great Britain, to Théophile Delcassé, Minister of Foreign Affairs (Feb. 22, 1899), in 15 D.D.F. (ser. 1) No. 88, at 141-43 (1959); Letter from Paul Cambon, French Ambassador to Great Britain, to Théophile Delcassé, Minister of Foreign Affairs (Feb. 27, 1899), in CORRESPONDANCE, *supra* note 803, No. 9, at 11; Letter from Paul Cambon, French Ambassador to Great Britain, to Théophile Delcassé, Minister of Foreign Affairs (Mar. 2, 1899), in CORRESPONDANCE, *supra* note 803, No. 10 Annex, at 113; see also ROUARD DE CARD, *LE DIFFÉREND*, *supra* note 357, at 14. In reporting on the agreement to the French Parliament, Delcassé stated that Borku and Tibesti would form a "natural rampart" for the French corridor between the Mediterranean and France's central African colonies. LANNE, *supra* note 11, at 20.

823. LANNE, *supra* note 11, at 23. The British War Office published a 1:3,000,000 scale map of the Sudan in 1914 showing exactly such a line. Shaw, *supra* note 269, at 51.

824. See *supra* note 815. A copy of the map is reproduced as Map 9.



Map 9: Alleged Copy of Map Annexed to the 1899 Declaration
 6 REVUE GÉNÉRALE DE DROIT INTERNATIONAL 311 (1899) (reprinted with permission).

the 1899 Declaration. This agreement, the fourth accord listed in the 1955 Treaty, stipulated that:

[N]othing in this Convention prejudices the interpretation of the Declaration of the 21st March 1899 according to which the words in Article 3 "... shall run thence to the south-east until it meets the 24th degree of longitude east of Greenwich ..." are accepted as meaning 'shall run thence in a south-easterly direction until it meets the 24th degree of longitude east of Greenwich at the intersection of that degree of longitude with parallel 19°30' of latitude.'⁸²⁵

Five years later France and Great Britain reinforced the interpretation given to the boundary in 1899 by signing a protocol (1924 Protocol) that definitively fixed on the ground the boundary between French Equatorial Africa and Sudan.⁸²⁶ Section VIII(g) of the agreement located the northernmost point of the boundary at 19°30' North latitude, 24° East longitude, marked on the land by "a small heap of stones to mark the end of the boundary."⁸²⁷ Because the Sarrah Triangle, north of the northern boundary of French Equatorial Africa, was still a British possession, this protocol can be taken to imply that the boundary separating the Sarrah Triangle from the French possessions south of it terminated at 24° East, 19°30' North.

This retrospective interpretation also presents problems. Italy had already accepted the boundary set in the 1899 Declaration and had occupied Libya (although the Italian presence in the Libyan interior was only brief). Now, by subsequent bilateral agreements, France and Britain "interpreted" and possibly changed that boundary. Although Britain still possessed the Sarrah Triangle, located immediately north of the boundary, and thus was free to negotiate its own interpretation with France, France would nevertheless be in breach of its 1902 agreement with Italy if it modified the boundary in a manner inconsistent with that agreement. In fact, Italy protested the 1919 Convention as an infringement on its rights, arguing that such a subsequent interpretation could not bind it unless that interpretation was actually the one France and Italy had in mind in 1902 when they agreed to abide by the 1899 line.⁸²⁸

The available evidence supports Italy's argument. Although several maps purporting to be the official map annexed to the 1899 Declaration have surfaced, nobody has been able to authenticate any of them. Most of the maps produced and circulated at the time of the agreement show the boundary intersecting 24° East at 18°45' North. The map published in France's 1899

825. Convention Supplementary to Declaration of Mar. 21, 1899, Sept. 8, 1919, U.K.-Fr., 1921 Gr. Brit. T.S. No. 6 (Cmd. 1239), 225 Consol. T.S. 480 [hereinafter 1919 Convention]. In the French version, the phrase "nothing . . . prejudices" is translated as "ne modifiera en rien," a phrase connoting an element of established usage. See LANNE, *supra* note 11, at 24. The convention was ratified by the French Parliament in 1923 and entered into force on December 6 of that year. See *id.* at 95.

826. Exchange of Notes with Protocol, U.K.-Fr., Gr. Brit. T.S. No. 28 (Cmd. 2221), 28 L.N.T.S. 462 [hereinafter 1924 Protocol].

827. *Id.* § VIII(g); see also Shaw, *supra* note 269, at 51.

828. See *supra* note 360 and accompanying text.

Yellow Book and presented by Chad to the Security Council in 1983—which is probably the map that France and Italy had in mind in 1902—also shows the intersection of the "limite des possessions françaises d'après la Convention du 21 mars 1899" intersecting 24° East at a point well below 19° North.⁸²⁹ Consequently, the 1919 Convention probably interpreted the 1899 Declaration in a manner inconsistent with the understanding of France and Italy when they negotiated the Barrère-Prinetti Letters in 1902.

Nevertheless, such an argument may not succeed. First, consistent with the intentions of Britain and France, contemporary maps placed Tibesti, Borku, and Ennedi within the French zone. The 1919 Convention merely gave effect to these intentions once the parties better understood the geography of the region. Second, Italy's subsequent practice may indicate that it did not believe that France occupied more territory in 1914-1916 than it was entitled to. As commentators have observed, "when there is a doubt as to the meaning of a provision or an expression contained in a treaty, the relevant conduct of the contracting parties after the conclusion of the treaty . . . has a high probative value as to the intention of the parties at the time of its conclusion."⁸³⁰ In 1914, France occupied territory up to the boundary as it would be interpreted in 1919. Neither Italy, which would later claim rights in Tibesti and Borku, nor Great Britain, which possessed the Sarrah Triangle and would thus suffer direct harm if France exceeded the understanding reached in 1899, objected. Italy claimed "compensations" after World War I based on the Treaty of

829. Maps will obviously play a very significant role in the Court's resolution of this case. In the *Minquiers and Ecrehos* case Judge Levi Carneiro stated that maps may be evidence that "the occupation or exercise of sovereignty was well known." *Minquiers and Ecrehos* (Fr. v. U.K.), 1953 I.C.J. 47, 105 (Nov. 17) (separate opinion of Judge Levi Carneiro). In the 1962 decision in *Temple of Preah Vihear* (Cambodia v. Thail.), 1962 I.C.J. 6 (June 15), the I.C.J. held that Thailand had acquiesced in or accepted an erroneous map and therefore could not challenge it. The Court treated the map, which had not been prepared or approved by a bilateral commission, as if it were part of the boundary agreement in question. See Guenter Weissberg, *Maps as Evidence in International Boundary Disputes: A Reappraisal*, 57 AM. J. INT'L L. 781, 792-98, 801 (1963). This decision prompted one observer to note that "in the adjudication of boundary disputes, maps have gained much more impact than they have possessed in the past." *Id.* at 792.

However, in the more recent Burkina Faso-Mali boundary dispute the Court adopted a more restrictive attitude, stating that "maps can still have no greater legal value than that of corroborative evidence endorsing a conclusion at which a court has arrived by other means." *Territorial Dispute* (Burk. Faso v. Mali), 1986 I.C.J. 554, 583 (Dec. 22). The Court did acknowledge, however, that when maps are "physical expressions of the will of the State," such as when annexed to an official text, they acquire "legal force for the purpose of establishing territorial rights." *Id.* at 582. International tribunals generally require that maps be accurate and reliable. In addition, maps produced by neutral parties, or that tend to restrain a state's rights, enjoy a greater degree of acceptance. See *id.* at 582-83; *Island of Palmas Case* (U.S. v. Neth.), 2 R.I.A.A. 829, 852 (Huber, Arb., Apr. 1928). See generally Charles Cheney Hyde, *Maps as Evidence in International Boundary Disputes*, 27 AM. J. INT'L L. 311 (1933).

830. MCNAIR, *supra* note 659, at 424; see also *International Status of South-West Africa*, 1950 I.C.J. 128, 135-36 (July 11) ("Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument."); SHARMA, *supra* note 544, at 180 (failures of third parties to contest exercise of sovereignty amounts to proof of "exclusive display of authority").

London, but it did not claim that France in 1914-1916 had overstepped the limits it had agreed to in 1902. Indeed, Italy's reliance on the Treaty of London rather than the Barrère-Prinetti Letters implies that Italy did not believe that the letters gave it a valid claim to the territory. Such conduct would have estopped Italy from later claiming that France exceeded the limits agreed to in 1902. As Judge Alfaro stated in the *Temple of Preah Vihear* case, "the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude that is manifestly contrary to the right it is claiming . . . is precluded from claiming that right."⁸³¹ When viewed against this prior acquiescence to the French occupation, Italy's protests after the 1919 Convention should not stand as an affirmation of its rights.⁸³²

b. *Effect of the 1955 Treaty on Earlier Agreements*

Assuming that Libya inherited from Italy claims arising from the possible breaches of the Barrère-Prinetti Letters, it effectively waived those claims when it agreed to the boundary defined by the 1955 Treaty. Through reference to the 1919 Convention and 1924 Protocol, that treaty fixed the endpoint of Libya's southern boundary at 24° East, 19°30' North. Therefore, even if Libya inherited any territorial claims from Italy, it would seem to have agreed to forego any claim that pushing the endpoint as far north as 19°30' violated the 1902 understanding between Italy and France. In addition, the 1955 Treaty elevated the status of the earliest treaties concerning the French sphere of influence. Originally, those treaties only delimited the areas in which France and Great Britain mutually pledged not to interfere with each other's efforts to acquire sovereignty. However, the 1955 Treaty made the boundaries negotiated in those agreements binding on Libya. In effect, Libya expressly agreed to be bound by earlier agreements made by Great Britain, even though Libya had no legal connection of succession or otherwise with Great Britain. Whatever the defects (such as the absence of a contemplated map) those treaties possessed at the time Britain and France concluded them, Libya's acceptance of

831. *Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 I.C.J. 6, 40 (June 15) (separate opinion of Judge Alfaro).

832. Although Italy did not contend that France had exceeded the limit it had set for itself in 1902, Italy argued that the Barrère-Prinetti Letters did not preclude it from claiming additional territory from France. Italy maintained that the 1902 agreement applied only to the western boundary of Libya and its southern boundary as far east as Tummo—but not beyond Tummo—so that there would have been no line east of Tummo for France to exceed. In fact, Italian colonialists employed this argument to pre-empt French assertions that the Barrère-Prinetti Letters precluded Italy from demanding territory from France. See CANTALUPO, *supra* note 357, at 257-58. Upon the basis of this argument, Italy proceeded to assert that the adjustment of the boundary west of Tummo by the Pichon-Bonin Accord in 1919 did not close the question of boundary adjustments east of Tummo. *Id.* at 259-60. Without an authentic copy of the official map, the Court will have to settle these questions of estoppel and treaty interpretation without definitive guidance.

the treaties effectively waived any right to raise those defects against Chad's title.

c. *The 1934 Exchange of Notes*

In the 1934 Exchange of Notes, Great Britain, Egypt, and Italy fixed the boundary of Sudan with Libya.⁸³³ The boundary was to start at the intersection of the twenty-second parallel with the twenty-fifth meridian of East longitude, then proceed south again along the meridian "as far as its junction with the frontier of the French possessions."⁸³⁴ Unfortunately, the agreement did not specify the location of this junction.

The agreement constitutes British recognition of Italy's right to the Sarrah Triangle, the strip of land located northwest of the eastern segment of the line drawn in 1899 and 1919.⁸³⁵ However, because the agreement merely fixed the boundary between Sudan and the Italian colony of Libya, it did not specify the southern frontier of the Sarrah Triangle—i.e., the part that bordered on the French possessions. That part of the boundary must be inferred from earlier agreements between France and the United Kingdom, particularly the 1919 Convention, to which Italy succeeded by virtue of the 1934 Exchange of Notes, and from practice.⁸³⁶

4. *The 1966 Treaty with Libya*

In addition to the treaties dating from France's control over Chad, Chad may also invoke a treaty of friendship (1966 Treaty) that it concluded with Libya in 1966.⁸³⁷ Article 2 of this treaty obligated each state to "grant facilities for the movement of the populations established on both sides of the frontier" within a specified zone, defined by reference to points in Libya and points in Chad. The treaty included Zouar in the Chadian zone.⁸³⁸ Chad has argued that this provision constitutes Libyan recognition of Chad's right to Zouar, especially in light of the fact that Chad was administering the town at the time the treaty was signed.⁸³⁹

Article 3 of the same treaty determined legal caravan routes for trade between the two countries. It defined the four legal routes by reference to

833. 1934 Exchange of Notes, *supra* note 372.

834. *Id.* para. 2, 155 L.N.T.S. at 47.

835. Prior to 1934 this territory belonged to Anglo-Egyptian Sudan. See BROWNIE, *supra* note 12, at 133. See also Map 10.

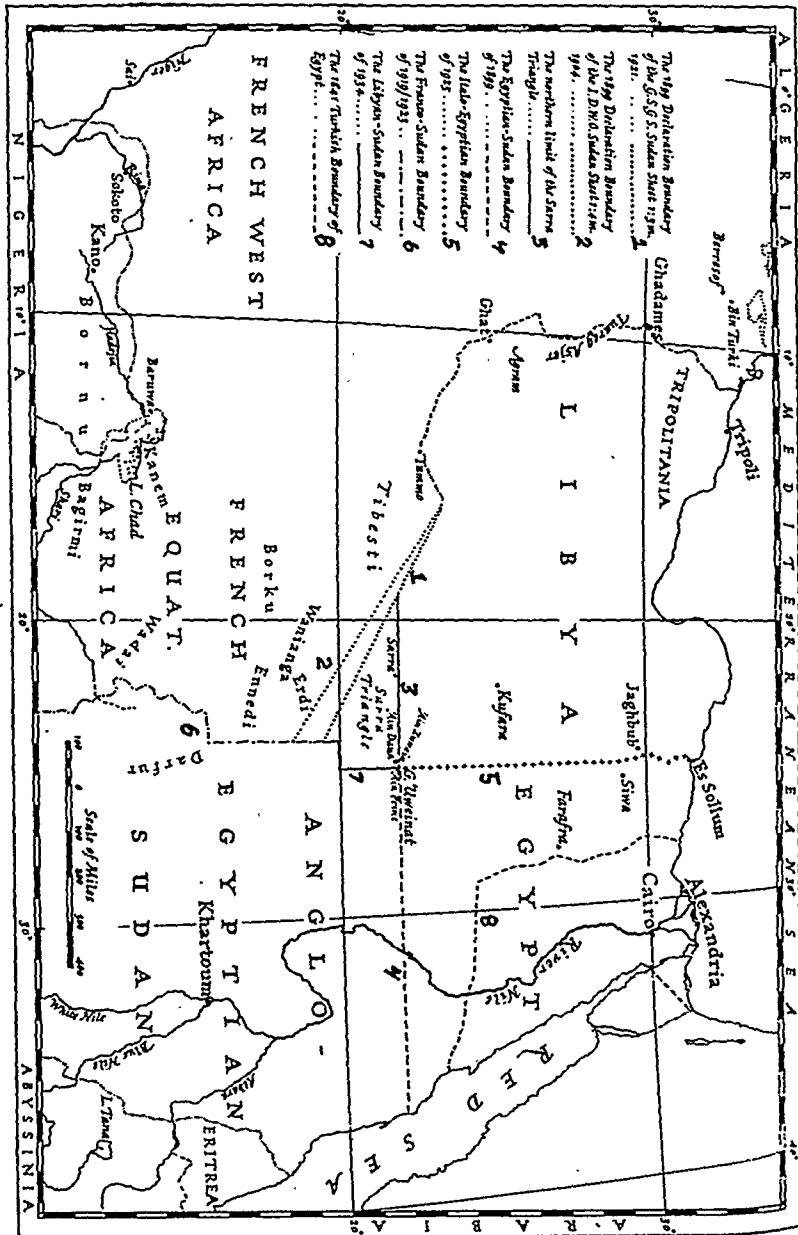
836. BROWNIE, *supra* note 12, at 135.

837. 1966 Treaty, *supra* note 429, quoted in *Chad Memorandum*, *supra* note 419, at 68.

838. *Id.* art. 2, quoted in *Chad Memorandum*, *supra* note 419, at 68.

839. *Chad Memorandum*, *supra* note 419, at 68. Zouar lies south of the Aouzou Strip, but Libyan forces were occupying it at the time Chad made this argument.

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Map 10: Sarrah Triangle and Alternative Boundary Positions According to Britain

85 GEOGRAPHICAL J. 50, 50 bis (1935) (reprinted with permission).

towns:

1. The Zouar, Bardai, Aouzou, Koufra (and vice versa), (Koufra in Libya) path;
2. The Largeau, Zouar, Wour, Korizo, Gatroum (and vice versa), (Gatroum in Libya) path;
3. The Largeau, Ounianga, Tekro, Koufra (and vice versa) path;
4. The Fada, Ounianga, Koufra (and vice versa) path.⁸⁴⁰

Chad has argued that the express designation of Kufrah and al-Qatrun as Libyan implies Libya's recognition that the other towns were within Chad.⁸⁴¹ For if Libya considered Aouzou to be within its territory, why did it specify that only al-Qatrun and Kufrah were Libyan? Why did it not insist, for example, that the first paragraph read "(Aouzou and Koufra in Libya)" instead?

5. Summary

Thus, under the Chadian argument, the 1955 Treaty established the frontiers of Libya with French possessions and fixed the southern boundary along a line developed during the twenty years between 1899 and 1919, a line to which later international accords explicitly or implicitly referred. Although the various accords that shaped and developed this boundary contain some irregularities—in particular the possible non-existence of a map on which the line was supposedly drawn and the vagueness of treaty language in the absence of such a map—they do provide strong evidence of international acceptance of the boundary claimed by Chad. Finally, the 1966 Treaty with Libya confirmed Libya's acceptance of Tibesti as Chadian territory.

B. Libyan Attempts to Undermine the 1955 Treaty

Because the 1955 Treaty embodies Libya's acceptance of the boundary claimed by Chad, Libya must seek to prevent the application of the treaty. It has two possible arguments. First, it could claim that the 1955 Treaty was superseded in 1972 by an agreement in which President Tombalbaye allegedly ceded the Aouzou Strip to Libya. The authenticity and validity of this agreement, however, are in grave doubt. Libya could also claim that the 1955 Treaty is invalid as the product of a coercive relationship between France, a powerful colonial state, and the pliant Libyan monarchy, beholden to Western interests and unable to resist Western demands.

840. 1966 Treaty, *supra* note 429, art. 3, quoted in *Chad Memorandum*, *supra* note 419, at 68.

841. *Chad Memorandum*, *supra* note 419, at 68.

1. *The Alleged Cession of 1972*

Chadian President Tombalbaye signed a treaty in 1972 (1972 Treaty) in Tripoli with Colonel Qaddafi that allegedly ceded the Aouzou Strip to Libya in a secret clause. According to some sources, the Swedish cartographers who prepared the Libyan maps incorporating the Aouzou Strip in 1976 reported that they relied on the 1972 Treaty more than on the Mussolini-Laval Accords in penning their coordinates.⁸⁴² Chad does not deny the existence of the treaty—indeed, Chad cited the agreement in its 1988 Memorandum to the Security Council⁸⁴³—but it does dispute that the treaty ceded territory to Libya.

Libya has also contended that Tombalbaye ceded it the Aouzou Strip in a letter to Qaddafi in 1972. Libya produced a photocopy of the letter at a meeting of the Bongo Committee in October 1987.⁸⁴⁴ In the letter, Tombalbaye promised, in his "capacity as legal President of Chad, . . . that the Aouzou Strip has been and always will be, without any doubt, an integral part of Libyan territory."⁸⁴⁵ Chad and various observers have raised serious doubts about the authenticity of this letter.⁸⁴⁶

Assuming the cession really did occur, Tombalbaye might have had reasons to go through with it. According to Libya, he ceded the Aouzou Strip in return for a promise of an end to Libya's support for the rebels and a pledge of

842. *Silence officiel et projets en cours*, JEUNE AFRIQUE, Dec. 17, 1976, at 32-33.

843. *Chad Memorandum*, *supra* note 419, at 68-69.

844. Comarin, *supra* note 11, at 8. The full text of the letter is reprinted in *id.* at 9.

845. *Quoted in id.* The letter also informs Qaddafi that Chad has decided to break off relations with Israel, and it asks Qaddafi to end Libyan aid to FROLINAT. *Id.*; see also Lemarchand, *The Case*, *supra* note 50, at 114.

846. First, until it produced the letter Libya had essentially refused to discuss the Aouzou Strip. Some have suggested that Qaddafi's military setbacks in the spring and summer of 1987, combined with his perception that African diplomatic opinion favored the Chadian arguments as better documented, induced Qaddafi to produce the letter. Comarin, *supra* note 11, at 9. Second, Libya may have released the letter in an attempt to stall the O.A.U. and prevent it from announcing an adverse decision in the Aouzou Strip dispute. *Id.* Third, Libya has never produced the original of the letter; the photocopy it sent to the Bongo Committee cannot be scientifically authenticated. Furthermore, the letterhead does not resemble that used by Tombalbaye at the time, the signature is illegible, and the spelling of Tombalbaye's name does not correspond to the spelling he used at the time. Chad has accused Libya of forging the letters from a composite of phrases drawn from other letters. *Id.* at 10. Fourth, the timing of the letter's release is suspicious. If Libya had the letter all along, it logically should have produced it earlier. *Id.* Instead, it waited until Tombalbaye, the only person who could have verified the letter, had been dead for twelve years. McKeon, *supra* note 651, at 156-57.

significant Libyan aid.⁸⁴⁷ Another version of the story alleges that Tombalbaye accepted a large personal bribe in exchange for the Aouzou Strip.⁸⁴⁸

Whatever the consideration, some circumstantial evidence suggests that Tombalbaye allowed Libya to occupy the Aouzou Strip. Tombalbaye protested neither the occupation nor the annexation of the territory, which occurred shortly after the signing of the 1972 Treaty and the alleged letter.⁸⁴⁹ When questioned in April 1974 by an inhabitant on the Libyan presence in Aouzou, Tombalbaye reportedly lost his cool and snapped, "This is a matter for the Chadian government, which is taking care of it."⁸⁵⁰ Tombalbaye also seemed to facilitate Libyan annexation of the area in his attempts to break up B.E.T., but Toubou protests forced him to abandon the effort.⁸⁵¹

Chad has challenged the validity of any territorial cession on the ground that Tombalbaye lacked the constitutional power to alienate national territory without parliamentary approval.⁸⁵² Although this argument may defeat claims arising under the 1972 Treaty or the letter from Tombalbaye to Qaddafi,⁸⁵³ the award in the maritime boundary arbitration between Guinea-Bissau and Senegal held that such constitutional defects do not necessarily deprive a treaty of its force.⁸⁵⁴

Although that decision represents a significant shift in the law, it probably does not apply to the 1972 Treaty. The Guinea-Bissau decision turned on the fact that Portugal's customary practice allowed France to expect Portuguese adherence to the treaty despite lack of parliamentary approval. Libya could not have had similar expectations regarding the 1972 Treaty. Although the later years of the Tombalbaye regime were increasingly authoritarian, the secrecy of the cession—if a cession ever occurred—suggests that Tombalbaye expected

847. See THOMPSON & ADLOFF, *supra* note 45, at 123; see also LANNE, *supra* note 11, at 228-29; Bernard Lanne, *Petit dictionnaire d'idées reçues sur le Tchad*, LE MOIS EN AFRIQUE, June-July 1981, at 134-35 [hereinafter *Petit dictionnaire*]; WHITEMAN, *supra* note 414, at 8. Hissène Habré made similar allegations against Tombalbaye. Comarin, *supra* note 11, at 10-11. Tombalbaye might not have felt that he was giving up very much, since northern Chad had slipped from the government's control by 1972. See Lemarchand, *The Case*, *supra* note 50, at 114.

848. See THOMPSON & ADLOFF, *supra* note 45, at 31; see also COOLEY, *supra* note 407, at 120; *Chad Foreign Minister on Aouzou Strip Dispute with Libya, April Coup Attempt* (BBC Summary of World Broadcasts, Aug. 12, 1989) available in LEXIS, Nexis Library, Wires File.

849. THOMPSON & ADLOFF, *supra* note 45, at 123-24; see also LANNE, *supra* note 11, at 229.

850. Comarin, *supra* note 11, at 10.

851. THOMPSON & ADLOFF, *supra* note 45, at 33.

852. *Chad Foreign Minister on Aouzou Strip Dispute with Libya, April Coup Attempt* (BBC Summary of World Broadcasts, Aug. 12, 1989) available in LEXIS, Nexis File, Wires Library. Article 5(3) of the constitution in force at the time made the President the guarantor of Chad's territorial integrity. Article 70 required the parliament to pass a law authorizing ratification of any treaty. See LANNE, *supra* note 11, at 230; McKeon, *supra* note 651, at 162 & n.158; Comarin, *supra* note 11, at 11..

853. See McKeon, *supra* note 651, at 161, 163 & n.167 (alleged cession void as manifest violation of fundamental law of Chad of which Libya should have known).

854. *Délimitation de la frontière maritime (Guinea-Bissau v. Sen.)* (1989), *annexed to* *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.)* (Application of Guinea-Bissau Instituting Proceedings Before the International Court of Justice, Aug. 23, 1989) (on file with author); see *supra* notes 776-778.

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public resistance. Nor can Libya claim that Chad acquiesced in the cession, since Chad has continually pressed claims to the Aouzou Strip. Claims by Libya based on the 1972 Treaty thus seem likely to fail before the Court. Moreover, arguing that Chad ceded the Aouzou Strip in 1972 implies that the Aouzou Strip was Chad's to cede. This argument could thus prove not only questionable but also risky.

2. *Attacking the 1955 Treaty as Colonial Diktat*

If arguments based on the 1972 Treaty are unlikely to succeed, Libya must undermine the validity of the 1955 Treaty. Since that treaty is the most significant document defining the boundary, and since in it Libya expressly agreed to accept the boundary Chad now claims, the 1955 Treaty would preclude Libya from asserting its own claims based on treaties or occupation—unless Libya can demonstrate that it did not freely assent to the 1955 boundary. Libya has asserted that the 1955 Treaty did not reflect the will of the Libyan people because King Idris, who concluded the agreement with France, was beholden to colonial powers and was unable to resist their demands. In particular, Libya has argued that the presence of French, British, and American military bases demonstrated Idris's dependence on Western imperialist powers and effectively rendered him a pawn of Western interests.⁸⁵⁵ The Qaddafi government has claimed that Libya was not truly free until the 1969 revolution.⁸⁵⁶ Libya has also contended that Idris forced the 1955 Treaty upon the Libyan people over the objection of the Libyan legislature (whose consent was not constitutionally required).⁸⁵⁷ The Libyan argument finds further support in King Idris's continued assertion of title to the Aouzou Strip despite the 1955 Treaty,⁸⁵⁸ an action that suggests Idris believed Libya had a valid claim but was unable to enforce it against France. This argument may win support from the Court,

855. The Libyan representative argued before the Security Council in 1983 that France's presence in southern Libya and Britain's presence in northern Libya placed Libya at a great disadvantage, and that France refused to remove its troops until Libya accepted the 1955 "agreement permitting it to take parts of Libya and annex them to its African territories." *2429th Meeting, supra* note 429, at 38-40 (statement of Mr. Treiki). In 1978 Libya raised a similar argument. The Libyan representative denied, "in view of the purely formal independence of the former royalist régime, the foreign bases—in particular British and American—in its territory and the foreign influence to which King Idris was subject," that Libya could have aided the Chadian rebels during the monarchy. *2060th Meeting, supra* note 441, at 6 (statement of Mr. Kikhia). The statement that Idris did not aid the rebels is false. Although Idris did not go to the same length as Colonel Qaddafi, he sent modest material aid and gave the rebels sanctuary in Libya. *See supra* note 413 and accompanying text.

856. Libyan representatives made these arguments at meetings with Chad in 1977, when Chad invoked the 1955 Treaty. *See Chad Memorandum, supra* note 419, at 66; *2429th Meeting, supra* note 429, at 54-55 (statement of Mr. Barma).

857. *See 2419th Meeting, supra* note 485, at 23-25 (statement of Mr. Treiki); *2429th Meeting, supra* note 429, at 38-40 (statement of Mr. Treiki).

858. Joffé, *supra* note 2, at 34.

especially in light of Judge Bedjaoui's expansive interpretation of coercion in Guinea-Bissau's maritime boundary arbitration with Senegal.

a. Idris's Early Ties to the West

The claim that Idris al-Sanusi served colonial interests does have some historical support, but it requires closer inspection. Evaluation of the claim requires a review of Idris's rise to power and his conduct as King of Libya.

Idris assumed leadership of the Sanusiya in 1915 following the abdication of his cousin Ahmad al-Sharif. Idris criticized his predecessor's attacks on British forces in Egypt and accordingly he quickly won British support, embarking on a long and mutually beneficial relationship with Great Britain.⁸⁵⁹ Idris made peace with Italy in 1917 and concluded a further Italian agreement in 1920 that recognized him as hereditary Amir of Cyrenaica, giving him political control of the main inland oases of Cyrenaica. Two years later Tripolitanian notables, reacting to Italy's heavy-handed rule there, offered Idris the Amirate of all Libya. Idris accepted in November 1922, but Italy's campaign to conquer Tripolitania prevented the union, driving Idris into exile in Egypt.⁸⁶⁰

Idris remained in Egypt until 1943 and further strengthened his ties with Great Britain. Shortly after the commencement of World War II the British asked Idris for cooperation in the fight against Italy. Libyan exiles in Cairo authorized Idris to collaborate with Great Britain, and they proclaimed a Sanusi Amirate in Cyrenaica and Tripolitania.⁸⁶¹ Yet not all the Libyan exiles approved of Idris's close relations with the British, even at this early stage. The revelation that Idris had secretly negotiated with Britain upset some Tripolitanian notables,⁸⁶² and they criticized him for not obtaining a British guarantee of full Libyan post-war independence.⁸⁶³ Idris in fact favored a British post-war protectorate in Libya, believing that Libya could not survive without British protection and assistance.⁸⁶⁴

859. WRIGHT, LIBYA, *supra* note 343, at 30-31.

860. *Id.* at 32; JONATHAN BEARMAN, QADDAFI'S LIBYA 15 (1986); EVANS-PRITCHARD, *supra* note 218, at 134, 148-55; PICHON, *supra* note 161, at 124-30.

861. WRIGHT, LIBYA, *supra* note 343, at 45-46; *see also* BEARMAN, *supra* note 860, at 17; EVANS-PRITCHARD, *supra* note 218, at 105-06, 226-27. Sanusi forces did participate in the effort against the Axis in an ancillary capacity, performing internal security tasks and thereby freeing British troops for combat duty.

862. BEARMAN, *supra* note 860, at 17.

863. WRIGHT, LIBYA, *supra* note 343, at 46.

864. BEARMAN, *supra* note 860, at 18.

b. *The Formation of the Libyan State*

The Sanusi cooperation during the war left Idris in good favor with the British after the defeat of the Axis in North Africa. In addition, Idris gained the solid support of Cyrenaica due to the established Sanusi presence in the region. The Tripolitarians, however, were divided on whether to support Idris.⁸⁶⁵

A further complication arose from the presence of Western forces in Libya. After the war the United States stationed bombers at Wheelus Field, east of Tripoli; Britain maintained airbases near Tobruk and Tripoli; and French forces remained in Fazzan, which they had conquered during the war.⁸⁶⁶ France in particular took a strong interest in the fate of Libya. Hoping to use Fazzan as a strategic buffer separating Algeria and Tunis from Arab nationalist influences emanating from Egypt, France resisted withdrawing its garrisons from the region.⁸⁶⁷

After the Big Four failed to agree on the future of Libya, they referred the matter to the U.N. General Assembly, which adopted a resolution calling for the establishment of an independent Libyan state.⁸⁶⁸ Meanwhile Britain, which was administering Cyrenaica, recognized Idris as the head of the Cyrenaican government and transferred responsibility to him in September 1949.⁸⁶⁹

During negotiations in the Libyan Preparatory Committee over the formation of the state, the Cyrenaican and Fazzanese delegations banded together against Tripolitania, which had twice their combined population. Whereas the Tripolitarians favored a unitary state in which their superior numbers could dominate, the other two regions desired a federal state, with each province possessing an equal voice. The Western nations also supported a federal state, believing that it would more easily enable them to preserve their bases.⁸⁷⁰ The Cyrenaican and Fazzanese proposal prevailed, and the Libyans proceeded to choose a National Assembly to decide on a constitution. Each province was to nominate twenty delegates to the assembly, subject to approval by the entire Preparatory Committee. Only three of the seven Tripolitanian members of the Preparatory Committee, however, voted to approve the Tripolitanian delegates to the National Assembly. The fact that the delegates of one-third of the population effectively picked the delegates from the other two-thirds troubled the Tripolitanian populace⁸⁷¹ and also the Arab League.⁸⁷² Dominated by

865. WRIGHT, LIBYA, *supra* note 343, at 50-51.

866. *Id.* at 49.

867. *Id.* at 54.

868. *See supra* notes 389-397 and accompanying text.

869. WRIGHT, LIBYA, *supra* note 343, at 55-56; *see also* BEARMAN, *supra* note 860, at 19.

870. WRIGHT, LIBYA, *supra* note 343, at 61.

871. *Id.* at 62-64; *see also* BEARMAN, *supra* note 860, at 23.

Cyrenaica and Fazzan, the National Assembly declared that Libya would be a federal constitutional monarchy with Idris as king. The decision sparked strong protests in Tripoli.⁸⁷³

c. The Early Years of the Monarchy

Idris demonstrated intolerance of political dissent in his kingdom from the start. After the first national elections, held in February 1952, the opposition National Congress Party accused the government of manipulating the votes. Violent protests and clashes with the police ensued in Tripoli. The government deported Congress Party leader Bashir Bey Sadawi, arrested others, and promptly dissolved the party. To this day a party system has not re-emerged in Libya.⁸⁷⁴

The Libyan monarchy quickly became a form of benevolent despotism. Although Idris pledged during the 1950 constitutional debate that he would waive his exclusive right to enter into treaties (thus assuring parliament that it would decide the future of the foreign military bases),⁸⁷⁵ he "emerged as the supreme arbiter of national affairs." He did not wield his power visibly, however, but rather through "a discreet system of palace power and patronage" that dissociated the monarchy from direct decision-making.⁸⁷⁶ This system of government created conditions for court intrigues and, later, corruption.

d. Foreign Policy, the Base Agreements, and the Final Years of the Monarchy

While Idris was a firm if not highly visible ruler, he pursued a timid course in foreign affairs, displaying a general reluctance to alienate the Western powers that nurtured him. In part, this meekness derived from his character. E.E. Evans-Pritchard, author of the classic study of the Sanusiya, wrote in 1947 that "[Idris] has never been a man of action."⁸⁷⁷ Although Evans-Pritchard found Idris to be "astute and a man of sound political judgment," he also described him as "often vacillating and evasive . . . , and though these characteristics may sometimes have been a wise response of the weak negotiating with the strong . . . , they seem to be weaknesses to which he is temperamentally prone and to have become an aversion to directness in either thought or

872. WRIGHT, LIBYA, *supra* note 343, at 65.

873. BEARMAN, *supra* note 860, at 23; WRIGHT, LIBYA, *supra* note 343, at 66.

874. WRIGHT, LIBYA, *supra* note 343, at 77-79; *see also id.* at 93 (discussing general lack of organized opposition during monarchy).

875. *Id.* at 68.

876. *Id.* at 81; *see also* BEARMAN, *supra* note 860, at 24.

877. EVANS-PRITCHARD, *supra* note 218, at 155.

action."⁸⁷⁸ Thus Idris by nature was not willing to challenge his Western benefactors when they demanded concessions.

More importantly, Idris was not in a position to resist the West even if he had been so disposed. Libya's extreme poverty made the kingdom dependent on French, American, and British aid for survival.⁸⁷⁹ In addition, Western development agencies under the auspices of Libya's creditors (chiefly the United States and Great Britain) supervised the Libyan economy, and Western technicians provided the economic infrastructure. Finally, three Western nations maintained military bases on Libyan soil. One historian starkly summarized the situation: "Libya was in fact an extreme instance of a dependent client state, exogenously formed by imperialist powers for their own advantage."⁸⁸⁰

These circumstances clearly constrained Idris in the realm of foreign policy, forcing him to accommodate the West—and in particular the much-resented military bases—often against the wishes of the Libyan people. In a population that was profoundly apathetic about political matters, the visible foreign military bases were perhaps the sole issue that roused the people.⁸⁸¹ The question of the bases provided the rallying-point for an underground opposition that criticized the government's close ties with Britain and the United States, believing that the bases propped up the monarchy.⁸⁸²

In 1953 Libya signed a treaty with Great Britain providing a twenty-year base lease and overflight rights in return for large foreign aid payments and the promise of military supplies. A similar agreement with the United States in 1954 allowed the United States to use Wheelus Field until 1970 for the sum of \$42,000,000. Neither of the deals had any popular support. The American agreement in particular met strong criticism. Idris had to overcome considerable parliamentary opposition, ultimately dismissing Omar Mansur Kikhia, the President of the Senate and a critic of the base agreement, in order to push the deal through.⁸⁸³ Attention now turned to the French military units in Fazzan.

France had been keeping forces in Fazzan by virtue of a temporary agreement signed on December 24, 1951, the date of Libya's independence. The agreement provided for six-month extensions pending the signing of a treaty of alliance. France had also been making certain financial contributions to Libya under a second agreement signed on the same date.⁸⁸⁴ France proposed

878. *Id.* at 156.

879. BEARMAN, *supra* note 860, at 24; WRIGHT, LIBYA, *supra* note 343, at 82.

880. BEARMAN, *supra* note 860, at 25.

881. WRIGHT, LIBYA, *supra* note 343, at 90.

882. *Id.* at 92.

883. *Id.* at 82-83; MAJID KHADDURI, MODERN LIBYA: A STUDY IN POLITICAL DEVELOPMENT 253-57 (1963) [hereinafter KHADDURI, MODERN LIBYA]. According to one scholar, Libya sought to use the base agreement to obtain U.S. diplomatic support in resolving outstanding issues with France and Italy. *Id.* at 253.

884. KHADDURI, MODERN LIBYA, *supra* note 883, at 258.

a treaty of alliance in late 1952, and in response Libya agreed in principle to allow French forces to remain in Fazzan.⁸⁸⁵ During the ensuing negotiations, the Libyan government had continued to show a "willingness to accept the principle of retaining French forces in Libyan territory," but an agreement eluded the parties.⁸⁸⁶

A change of governments in each country broke the deadlock, and when the negotiations resumed in the summer of 1954, Mustafa Ibn-Halim, the Libyan Prime Minister, informed France that it would have to withdraw its forces.⁸⁸⁷ France initially rejected an evacuation, but in November Ibn-Halim, under pressure from the Libyan Parliament, insisted on a withdrawal and stated that Libya was not willing to renew the temporary military agreement beyond the end of the year.⁸⁸⁸ In January 1955 France agreed to evacuate its forces.⁸⁸⁹

This agreement formed the basis for further negotiations in Tripoli in July. France insisted, however, on retaining the right to return her forces to Fazzan if a foreign power launched an armed attack. Ultimately, the parties reached an agreement embodied in the 1955 Treaty, whereby France would evacuate its forces within one year but retained air and surface transportation rights in Fazzan, and each party agreed to consult the other in the event or threat of war.⁸⁹⁰ Of course, the 1955 Treaty contained one further notable provision: Article 3, which defined Libya's boundaries with France's possessions.⁸⁹¹ The Libyan Parliament approved the 1955 Treaty in a closed session. According to one historian, "[n]o serious opposition was raised against it, although a few attacked the treaty on account of [Ibn-Halim's] acceptance of the rectification of the frontiers in favor of France."⁸⁹²

The Sanusi monarchy continued for fourteen years after the conclusion of the 1955 Treaty. Before the oil boom of the 1960s Libya continued to skirt

885. *Id.*

886. *Id.* at 258-59; see also HENRY SERRANO VILLARD, *LIBYA: THE NEW ARAB KINGDOM OF NORTH AFRICA* 149 (1956).

887. KHADDURI, *MODERN LIBYA*, *supra* note 883, at 259.

888. *Id.*; WRIGHT, *LIBYA*, *supra* note 343, at 84.

889. KHADDURI, *MODERN LIBYA*, *supra* note 883, at 259-60.

890. *Id.* at 260; WRIGHT, *LIBYA*, *supra* note 343, at 85; see also VILLARD, *supra* note 886, at 150.

891. Some historians have described this clause as effecting a "rectification" of the boundary in France's favor. KHADDURI, *MODERN LIBYA*, *supra* note 883, at 260; WRIGHT, *LIBYA*, *supra* note 343, at 85.

892. The treaty was ratified on April 10, 1956. KHADDURI, *MODERN LIBYA*, *supra* note 883, at 261; WRIGHT, *LIBYA*, *supra* note 343, at 84. In addition to the agreements with Great Britain, the United States, and France, Libya also signed a treaty with Italy guaranteeing the rights of Italian settlers to property expropriated from Libyan tribes by the fascists. One historian has described these agreements as "unequal treaties" guaranteeing the country's subordination to Western foreign policy." BEARMAN, *supra* note 860, at 25-26.

Libyan forces did attempt to enter the Aouzou Strip while the parties were negotiating the 1955 Treaty, giving some credence to claims that Libya believed it owned the territory. See *supra* note 399 and accompanying text.

between the powerful nationalist influences of Egypt and the need to maintain the flow of Western aid. During the Suez Crisis of 1956 Idris successfully extracted the British promise not to use its Libyan bases against Egypt.⁸⁹³ Throughout this period Libya pursued a passive policy designed not to alienate any one state. Western aid continued, and by the end of the decade oil exploration began to provide substantial revenues.⁸⁹⁴

Libya's new financial security had a significant political impact: it finally enabled Libya to adopt a more independent foreign policy. By the late 1960s the government had negotiated the withdrawal of some foreign troops and had made clear its desire not to renew the base agreements. Even in 1964, however, Idris still opposed severing all links with Great Britain, and he briefly abdicated before Libya reached a compromise providing for British and U.S. training for its armed forces.⁸⁹⁵

The influx of oil revenue also multiplied the opportunities for governmental corruption. The bureaucratic structure, dominated by members and favorites of the Sanusi family, proved ripe for bribery and nepotism. The electoral system, too, had always been susceptible to manipulation, influence-peddling, and patronage. Although the problem was only just beginning in 1960, by 1969 it had become a major justification for the overthrow of the regime.⁸⁹⁶ When Mu'ammar 'al-Qaddafi initiated his coup against Idris, the Sanusi regime was both widely unpopular and deeply corrupt. Qaddafi met virtually no resistance.⁸⁹⁷

e. *Conclusion*

The circumstances of Idris's reign arguably support Libya's claim of foreign domination. The triumph of the federal model despite opposition from two-thirds of the population gave rise to cries of Western intervention. Idris's long-standing relationship with the West did not help matters. Clearly, Idris was the favorite of the West, particularly Great Britain, to whom he owed much of his good fortune. Furthermore, Idris's natural tendency to avoid taking a firm stance and his heavy dependence on Western financial support strengthens the coercion argument. The maintenance of foreign military bases on Libyan soil despite strong public opposition further suggests coercion, and the presence of Western troops in turn further constrained Idris's freedom to act. Finally, the suppression of organized domestic opposition removed countervailing influences that might have pushed the government to resist the West.

893. WRIGHT, LIBYA, *supra* note 343, at 86.

894. *Id.* at 87.

895. *Id.* at 98-99, 104.

896. *Id.* at 89-90.

897. *Id.* at 120-21.

In this context, the apparent *quid pro quo* in the 1955 Treaty—the removal of the French forces from Libyan soil in exchange for a boundary agreement and certain arrangements permitting French forces to cross Fazzan—may support a claim of coercion under an expansive interpretation of that term.

C. The Mussolini-Laval Accords

If Libya can discredit the 1955 Treaty, it could then adduce other evidence to support its claims to the Aouzou Strip. In particular, Libya could invoke the 1935 Mussolini-Laval Accords.⁸⁹⁸ This agreement, of which the 1955 Treaty conspicuously omits any mention, contains France's agreement to cede the Aouzou Strip to Italy, and indeed it defines the southern limit of the Aouzou Strip. However, the validity of this agreement, and in particular the validity of the Treaty of Rome delimiting the mutual boundaries of French and Italian possessions, remain a matter of fierce debate. France and Italy each ratified the accords, but they never exchanged the instruments of ratification. Furthermore, Italy denounced the accords in 1938 without ever having occupied the Aouzou Strip. The Mussolini-Laval Accords, then, are not likely to furnish persuasive support for Libya's claim.

1. The Treaty of Rome

The 1935 Accords were partly the product of European politics. Italy claimed certain territorial adjustments under Article 13 of the Treaty of London as compensation for siding with the Entente during the war.⁸⁹⁹ Although Italy gained certain concessions on Libya's western border under the Pichon-Bonin Accord, it still claimed additional "compensations,"⁹⁰⁰ and in December 1928 France offered Italy a triangle of land in northern Niger and southern Algeria. However, Mussolini spurned this proposal and demanded all of Tibesti, most of Borku, and a large portion of Ennedi, a counterproposal that met with little enthusiasm from the French.⁹⁰¹ By 1935, however, the growing German threat induced France and Italy to reach an agreement. Mussolini, who had earlier positioned his forces in the Brenner Pass to deter Hitler's annexation of Austria, wanted to improve his ties to Britain and France. Similarly, Britain and France hoped to use Mussolini as a counterweight to German aggres-

898. Treaty, Protocol and Declarations for the Settlement of Respective Interests in Africa, Jan. 7, 1935, Fr.-Italy, 49 *Trattati e Convenzioni* (Italy) 16 [hereinafter *Mussolini-Laval Accords*]. Libya has in the past invoked the Mussolini-Laval Accords in support of its claim. See BOUQUET, *supra* note 174, at 80; JOUVE, *supra* note 437, at 153; Joffé, *supra* note 2, at 33; Legum, *supra* note 440, at 53.

899. See *supra* notes 353-356 and accompanying text; see also L'ANNE, *supra* note 11, at 83-85, 87.

900. See *supra* notes 357-363 an accompanying text.

901. See L'ANNE, *supra* note 11, at 107-09.

sion.⁹⁰² Thus in 1934 and 1935, seeking to prevent an Italo-German alliance in Europe, France agreed to substantial territorial concessions to Mussolini in Africa.⁹⁰³

Whereas the boundary claimed by Chad follows a straight line drawn between geographical coordinates, the line negotiated in 1935 is defined, at least for part of its western half, by natural features of the land. Its eastern half is a straight line drawn to the intersection of the twenty-fourth meridian with 18°45' North latitude.⁹⁰⁴ The line runs roughly parallel to the line claimed by Chad. The greatest distance separating the two lines is approximately ninety miles, at 18° East. The smallest separation is approximately fifty miles, at either end.⁹⁰⁵

The initial reaction in France was favorable. The agreement put an end to the Italian claims under the Treaty of London and promised to preserve peace in Europe with only minimum concessions.⁹⁰⁶ Some French colonialists criticized the accords, however, arguing that they replaced a natural frontier—the desert—with an artificial line that gave Italy a territorial toehold on the other side of the Sahara and that split a geographically and ethnically homogeneous region.⁹⁰⁷ Nevertheless, the Comité de l'Afrique française supported the accords, believing the boundary to be workable.⁹⁰⁸

But the Mussolini-Laval Accords represented more than a boundary determination between Italy and France in the central Sahara. The Treaty of Rome, the part of the Accords that settled the boundary, also committed the parties to settle "by a special Convention, of which the bases are fixed in a special protocol of even date [with this agreement]" "the rights of Italians and Italian colonial subjects in Tunisia."⁹⁰⁹ This subject had actually been a major bone of contention between France and Italy,⁹¹⁰ so its resolution constituted a major part of the accords.⁹¹¹ The treaty called upon the parties to negotiate this convention "as quickly as possible, in such a manner that it will enter into force on the same date as the present Treaty."⁹¹² The accords also included

902. *See id.*

903. *See id.* at 126.

904. Mussolini-Laval Accords, *supra* note 898, art. 2, 49 Trattati e Convenzioni (Italy) at 17-18.

905. *See* BROWNIE, *supra* note 12, at 122. For a map of the 1935 boundary line, see Map 11.

906. *See* L'ANNE, *supra* note 11, at 135.

907. *See, e.g.,* J. Ladreit de Lacharrière, *Après les Accords de Rome*, 45 B.C.A.F. 73, 75-76 (1935) (comments of Gen. Tilho); *see also* L'ANNE, *supra* note 11, at 137-38.

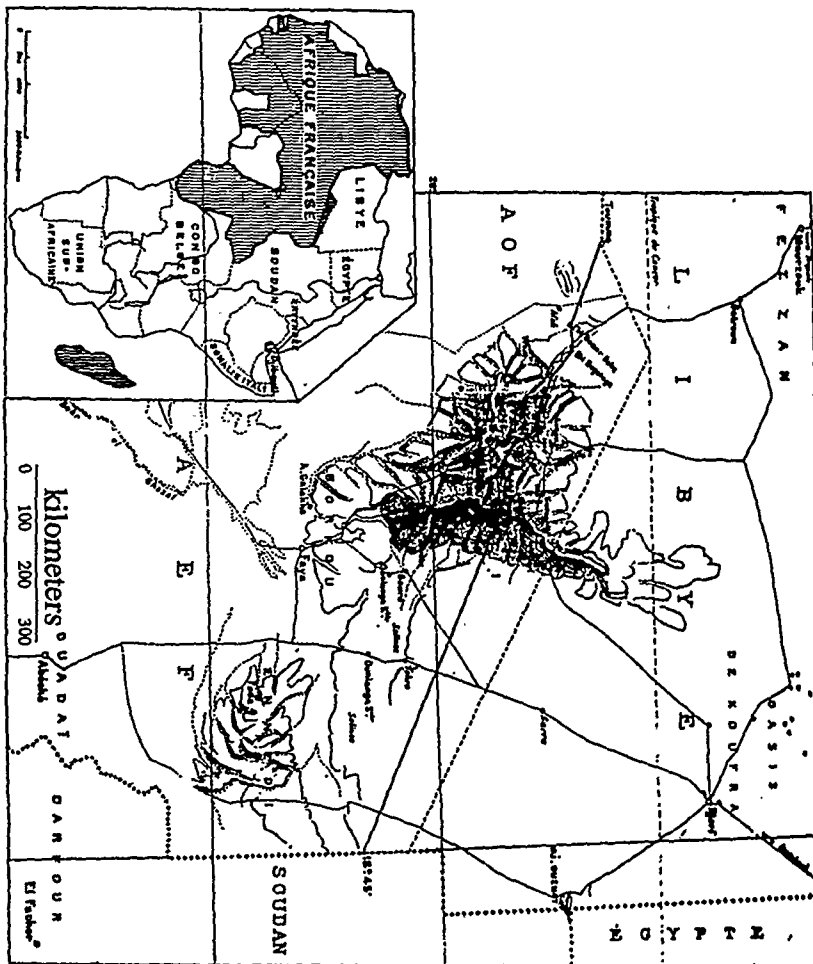
908. *See* Comité de l'Afrique française, *L'Accord franco-italien*, 45 B.C.A.F. 3, 3-6 (1935); *see also* L'ANNE, *supra* note 11, at 139.

909. Mussolini-Laval Accords, *supra* note 898, art. 1, 49 Trattati e Convenzioni (Italy) at 17.

910. *See* PICHON, *supra* note 161, at 220-25.

911. One observer has asserted that Mussolini accepted relatively modest territorial concessions from France because he was anxious to settle the Tunisian nationality question and to obtain France's assent to eventual Italian intervention in Ethiopia. Comarin, *supra* note 11, at 7.

912. Mussolini-Laval Accords, *supra* note 898, art. 1, 49 Trattati e Convenzioni (Italy) at 17. After signature of the accords, the French Deputy Henry Bérenger asked the French government to ensure that all the accords be ratified at the same time. Ladreit de Lacharrière, *supra* note 907, at 75.



Map 11: The Boundary Delimited in the Mussolini-Laval Accords
Chad Memorandum at 77 (see note 419).

a secret agreement giving Italy a sovereign hand in Ethiopia.⁹¹³

When the Treaty of Rome came before the French Parliament, this protocol had still not been negotiated. The Chamber of Deputies authorized ratification by a vote of 555-9, the Senate voted unanimously to approve the treaty in March 1935, and President Albert Lebrun ratified the agreement shortly afterward.⁹¹⁴ The Italian Parliament overwhelmingly approved the agreement in May 1935, and it was ratified in June.⁹¹⁵ However, the brutal Italian invasion of Ethiopia shortly thereafter, and the reaction of the League of Nations (including the ordering, with French participation, of sanctions in October 1935) quickly removed any chance of finalizing a treaty and completing the Tunisian protocol.⁹¹⁶ The parties never exchanged instruments of ratification for the Mussolini-Laval Accords⁹¹⁷ and never completed the convention on Tunisian nationality.

In December 1938 the French Ambassador to Italy, André François-Poncet, told Count Galeazzo Ciano, the Italian Minister of Foreign Affairs, that the French government still considered the 1935 Accords a legitimate settlement of the French and Italian claims in Africa, and he asked Ciano whether the Italian government still viewed the accords as viable. Ciano responded by officially denouncing the accords, noting that the French failure to ratify the treaty precluded its validity.⁹¹⁸ He also noted that the legitimacy of the treaty depended upon French acceptance of Italian expansion in East Africa and that France had never indicated such acceptance.⁹¹⁹

2. Analysis of Libya's Argument

Libya has asserted that the Laval-Mussolini Accords are in force between it and Chad and that they support its claim to the Aouzou Strip.⁹²⁰ This claim cannot stand, since the failure to conclude the Tunisian convention and to exchange instruments each sufficiently deprived the treaty of any force under contemporary international law.⁹²¹ First, the accords contemplated a conclu-

913. L'ANNE, *supra* note 11, at 130-31.

914. *Id.* at 147, 167; *see also* PICHON, *supra* note 161, at 256.

915. L'ANNE, *supra* note 11, at 167-68; PICHON, *supra* note 161, at 256.

916. *See id.* at 154-55.

917. *See supra* note 770 and *infra* note 926 and accompanying text.

918. L'ANNE, *supra* note 11, at 159, 171. For the text of the Italian response, *see La Note Italienne*, LE TEMPS, Mar. 31, 1939, at 2.

919. L'ANNE, *supra* note 11, at 171-72.

920. 2429th Meeting, *supra* note 429, at 61 (statement of Mr. Treiki); *see also* 2419th Meeting, *supra* note 485, at 6-7 (statement of Mr. Miskine); 2429th Meeting, *supra* note 429, at 52-56 (statement of Mr. Barma) (reporting Libyan assertions made during bilateral discussions); *Chad Memorandum*, *supra* note 419, at 66-67.

921. In its bilateral talks with Libya in 1976 and 1977 and before the Security Council in 1983, Chad argued that the failure to exchange ratifications and Italy's denunciation deprived the Mussolini-Laval Accords of force. *See* 2419th Meeting, *supra* note 485, at 7 (statement of Mr. Miskine) (arguments before

sion of the Tunisian convention as a necessary component of the main treaty. The Tunisian convention was not severable. Rather, it was an implied condition of the Treaty of Rome, intended to enter into force on the same day.⁹²² Therefore, because the convention did not enter into force, the main treaty itself could not have entered into force.

Second, contemporary international law required ratification before treaties could become binding,⁹²³ and the Treaty of Rome expressly provided that it would not enter into force until the parties exchanged the instruments of ratification.⁹²⁴ Because the process of ratification was never completed, the treaty had no effect. Libya could seek to avoid this conclusion by arguing that France's signature and ratification sufficiently demonstrated its satisfaction with the agreement. This claim would draw upon the arguments developed in the maritime boundary arbitration between Guinea-Bissau and Senegal, where the tribunal de-emphasized the formalities of the treaty approval process and examined instead whether each party could reasonably expect, under the circumstances, that the other would honor its commitments.

However, such an argument is flawed in the present case since the exchange requirement was intended precisely as a means of ensuring compliance by the counterparty. France did not consent to the Mussolini-Laval Accords in 1935 out of good will—it relied on the benefit of a *quid pro quo* from Italy. By requiring that the Treaty of Rome become effective only upon the exchange of ratifications, the accords assured France that Italy would be bound by its commitments. The exchange of ratifications thus constituted an essential part of the agreement, and the argument that legislative authorization sufficed to show intent to be bound would deprive France of the benefit of its bargain. Consequently, the Mussolini-Laval Accords may not fit within the situation envisioned by the arbitrators in the Guinea-Bissau-Senegal dispute. The formalities that were not observed in that case were matters of domestic law and did not reflect upon the parties' intention to be bound. Here, by contrast, the formality that was not observed was included in the agreement precisely to assure that the parties would be bound.⁹²⁵

Security Council); 2429th Meeting, *supra* note 429, at 52-55 (reporting 1976 and 1977 discussions); *Chad Memorandum*, *supra* note 419, at 67-69. Chad did not refer to the failure to complete the Tunisian convention. This argument concerning the failure to exchange ratifications was in fact also made by an Italian commentator at the time. See Virginio Gayda, *Tra Italia e Francia: Tutto da rifare*, *GIORNALE D'ITALIA*, Dec. 10, 1938, at 1. Libya has asserted that notwithstanding the parties' failure to conclude a Tunisian accord and to exchange the instruments of ratification, the agreement "exists and will remain in existence." 2429th Meeting, *supra* note 429, at 61 (statement of Mr. Treiki).

922. See *supra* note 780 and accompanying text.

923. See *supra* notes 770-773 and accompanying text.

924. See *supra* note 775.

925. Of course, if either France or Italy had a practice of inserting provisions into their agreements requiring exchange of ratifications, and then regularly honored such agreements without actually completing the exchange, the Mussolini-Laval Accords might be considered binding.

Libya could respond, however, that Italy likewise authorized ratification, thus indicating its intention to adhere to the terms of the agreement. It could further argue that even in 1938 France still considered the Mussolini-Laval Accords to be a viable settlement for the parties' interests in Africa.⁹²⁶ Chad could reply that France's willingness to honor the agreement remained contingent upon Italy's honoring its commitments, since French forces remained in the territory that was to have been ceded. Moreover, the fact that France asked Italy in 1938 whether it still considered the Accords to be valid suggests that France was willing to be bound only if Italy followed suit.

Finally, Italy's denunciation of the Treaty of Rome in 1938, after failing to take any steps to occupy the territory designated to it by the Treaty,⁹²⁷ indicated an intent not to be bound.⁹²⁸ The treaty certainly contained an implied right to terminate the agreement. All three factors from which such an intent could be inferred—the surrounding circumstances, the terms of the agreement, and the nature of the subject matter—support an implied right of termination in this case. First, the parties negotiated the Treaty for the purpose of settling their colonial differences in Africa and forging mutual ties against Germany. By 1938, the deteriorating political situation in Europe prevented the realization of these goals. Second, the Accords included a secret protocol relating to Ethiopia and provided for prompt negotiation of the Tunisian convention. Yet the Accords were unable to satisfy the parties' expectations in both cases. Finally, the subject matter included the cession of territory and the conclusion of an additional convention; neither had occurred by 1938. On the whole, the Mussolini-Laval Accords fundamentally failed to achieve their purposes.

The 1955 Treaty, if valid, would remove any lingering doubt about the validity of the Treaty of Rome. In the list of agreements "in force" relating to the border between Libya and France's African possessions, the 1955 Treaty specifically excluded mention of the Mussolini-Laval Accords.⁹²⁹ Chad has capitalized on this fact, asserting that France deliberately omitted the Accords as a means for definitively negating their validity.⁹³⁰ The argument finds support in a general principle of treaty interpretation, *inclusio unius est exclusio alterius*, which presumes that where the parties expressly include some items, they intend to exclude the rest.⁹³¹ Under this reading the 1955 Treaty

926. See *supra* note 918 and accompanying text.

927. France's continued presence in the Aouzou Strip and Libya's failure to take possession of the territory prevented the cession from becoming effective. "[A] cession becomes effective only with the actual transfer of sovereignty." Schwartzberger, *supra* note 651, at 319.

928. See *supra* notes 918-919 and accompanying text.

929. See *supra* notes 784-785 and accompanying text.

930. See *Official Record of the 2060th Meeting*, U.N. SCOR, 33d Sess., 2060th mtg. at 2, U.N. Doc. S/PV. 2060 (1987) [hereinafter *2060th Meeting*] (statement of Mr. Kamougué); *2419th Meeting*, *supra* note 485, at 11 (statement of Mr. Miskine).

931. See McNair, *supra* note 659, at 399-401.

would have removed any residual authority of the Mussolini-Laval Accords upon entering into force.⁹³²

D. *The Sufficiency of the French Occupation*

Libya can mount two challenges to the French occupation of the Aouzou Strip under traditional principles as alternatives to its claims under the Mussolini-Laval Accords. First, it could claim that the occupation was legally insufficient—i.e., that France did not demonstrate a sufficient degree of control over the region. This argument is without merit.

A review of the history yields the conclusion that France did not effectively occupy Tibesti, Borku, and Ennedi by 1916, or by 1919, when France and Italy met to discuss the "compensations" due to Italy under Article 13 of the Treaty of London. Turkish troops beat French forces to Tibesti and Borku: they set up posts at Bardai in 1908 and outside Ain Galakka in 1911,⁹³³ and they did not evacuate these areas until 1912. France then pursued and consummated a campaign to subdue the Toubous and drive the Sanusi from Borku, Ennedi, and Tibesti. This campaign lasted until 1914, but French forces withdrew from Tibesti during World War I and did not return until 1929.⁹³⁴ In this interval Tibesti in particular sank into a state of internal disorder, as evidenced by the appeals from Toubou notables asking the French to reoccupy the area.⁹³⁵

France's brief occupation of Tibesti and Borku probably did not suffice to perfect title under international law in force at that time. The period of occupation was too short, especially in light of the disorder that followed. Yet even if the occupation did suffice to perfect title, international law probably would have determined that France had abandoned the territory. Although a state generally had to show the *animus* to abandon in addition to the physical withdrawal, a sufficient lapse of time could give rise to a presumption of the necessary *animus*.⁹³⁶ Moreover, France failed to satisfy the continuing obligation to maintain an administration capable of keeping order and protecting life and property.⁹³⁷

Consequently, Tibesti again became *terra nullius* when France withdrew its forces in 1916. It was therefore open to occupation by another power,

932. See McKeon, *supra* note 651, at 162.

933. Until this time France disavowed any intention of occupying Borku, Tibesti, or Ennedi. See *supra* notes 319-320 and accompanying text. French colonialists recognized that Turkey arrived at the area before France, and they castigated the French government for its inaction. See de Caix, *La question*, *supra* note 288, at 90.

934. See *supra* notes 344-352 and accompanying text.

935. See *supra* notes 348-349 and accompanying text.

936. See *supra* note 693 and accompanying text.

937. See *supra* note 524 and accompanying text.

including Italy. Italy, however, was concentrating on subduing Fazzan. The French carefully monitored Italy's progress and reoccupied Tibesti in 1929 as Italian forces approached the area.⁹³⁸

The second French occupation of Tibesti clearly satisfied the legal requirements for acquisition of title under international law. Except for isolated and unsupported Libyan statements denying that France ever exercised sovereignty in the region,⁹³⁹ no one has ever seriously challenged the effectiveness of the French occupation. France governed B.E.T. as a military territory; its forces successfully ended the Toubous' raiding, and the French occupation brought order and security to the region.⁹⁴⁰ Therefore, if the land was *terra nullius* from 1916, France would have regained valid title by 1929-1930, when its second occupation commenced.

Even if Italy had protested the 1930 French occupation, it probably could not have defeated France's title. Italy could claim the territory only as part of its sphere of influence, as it did not attempt to occupy the region. Moreover, in the event that Italy possessed an inchoate title as a result of the Barrère-Prinetti Letters of 1902, that title would have lapsed in the interim period, and the area again would have become *terra nullius*. Thus, in 1930 Italy had no valid entitlement under the Barrère-Prinetti Letters that Libya could invoke today.

E. Occupation and the Question of Prior Title

If the French occupation was sufficient under the applicable legal principles, then Libya will have to claim that the occupation was illegal.⁹⁴¹ For instance, Libya could argue that the area was already under the sovereignty of its inhabitants, the Sanusiya, or Turkey, and therefore was not open to occupation. Under traditional principles of occupation these arguments probably will not succeed. But arguments using either hinterland theories or those akin to the Morocco claims in *Western Sahara* may succeed if the Court accepts the underlying premise of the argument: that the geographical and social milieu of the Sahara requires an alternative legal standard for resolving the dispute. In addition to attacking Chad's title, Libya can also use this argument to support its own claim to the region: if the region was under

938. See *supra* note 351 and accompanying text.

939. See *supra* note 491 and accompanying text.

940. See Léon Bureau, *Le Tibesti d'après les explorations les plus récentes*, 13 *LE MONDE COLONIAL ILLUSTRÉ* 19 (1935).

941. Libya has made such claims before. See *2419th Meeting, supra* note 485, at 23-25 (statement of Mr. Treiki) ("There has never been any sovereignty by Chad over Aouzou throughout history—not during the royal era, not after the revolution, and not during the Italian or Ottoman periods."); *2429th Meeting, supra* note 429, at 38-40 (statement of Mr. Treiki) ("Throughout the Ottoman period, and the Karamally [sic] period before it, and throughout the Italian period, France . . . had no sovereignty whatsoever over the Aouzou Strip.").

Turkish or Sanusi sovereignty Libya can claim title as the successor. Chad's likely response would be that the French occupation was valid, since no one—neither the Toubous, nor the Sanusi, nor the Turks—had title to the region when the French arrived.⁹⁴² The available evidence favors Chad, however, and since in boundary disputes each side bears the burden of proving its case,⁹⁴³ Libya probably will not defeat Chad's claims.

1. *The Toubous*

The original inhabitants of the Aouzou Strip were the Toubous, who almost certainly fell into the category of "savage" tribes that troubled contemporary European jurists and produced so much disagreement among commentators. Some scholars argued that such tribes, as long as they possessed even the most rudimentary form of political organization, possessed sovereign rights over the territory they inhabited. These writers thus maintained that European states could acquire sovereignty over that territory only through a treaty of cession.⁹⁴⁴ The opponents of this argument, who constituted the predominant voice during the colonial period, believed that the tribes lacked sovereignty unless they could assure the Europeans of their accustomed rights or could repulse outside attempts to occupy their land. These writers denied that such tribes could validly cede sovereignty since they did not possess sovereign rights themselves.⁹⁴⁵

European states nevertheless did make a practice of concluding so-called "glass-bead" treaties with native leaders. Contrary to the holding of the I.C.J. in the *Western Sahara* case, however, this practice did not imply that Europeans recognized those tribes as sovereign entities. The treaties were intended merely to notify other powers of a state's intentions in an area and to provide evidence of an effective occupation. Moreover, the treatment of the tribes after such agreements, and the European practice of creating spheres of influence without regard to ethnic and racial divisions, belie any suggestion that European states viewed tribes as sovereign entities.

Even if the law recognized that some indigenous tribes possessed sovereign rights, the Toubous probably did not reach the threshold level of internal organization and cohesion that the law required. Recall that Toubou society

942. After Turkey and Italy protested the 1899 Declaration, France argued that the area was *terra nullius*. See Dispatch from Théophile Delcassé, Minister of Foreign Affairs, to Ambassador Constans with Note for the Sublime Porte (May 29, 1899), in 15 D.D.F. (ser. 1) No. 191 Annex, at 318-19 (1959) (territory was "in an organic state, independent of any civilized Power"). French colonialists concurred. Cf. *L'Arrangement*, *supra* note 260, at 144.

943. See *Island of Palmas Case* (U.S. v. Neth.), 2 R.I.A.A. 829, 837 (Huber, Arb., Apr. 1928); *Minquiers and Ecrehos* (Fr. v. U.K.), 1953 I.C.J. 47, 52 (Nov. 17); *Western Sahara*, 1975 I.C.J. 10, 41 (Oct. 16).

944. See *supra* notes 592-591 and accompanying text.

945. See *supra* notes 584-584 and accompanying text.

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is loosely organized along clan lines and that the clan plays almost no role in defining relationships of authority and obedience. Clan chiefs enjoy only honorific authority and have no power to coerce members of the clan to take or refrain from a specified action. Rather, each individual is free to act as he chooses.⁹⁴⁶

To some extent this pattern of organization may have begun to change among the Teda at the time of the French colonization, since *Derde* Chai had gained some powers among the Teda clans. He was already the recognized spiritual authority, he had some authority to administer justice, and he represented the Teda in their relations with other clans and with outside powers. Chai had also gained some authority to tax agricultural produce and booty from raids, and he perhaps possessed additional leverage from his position as *kaymakam*.⁹⁴⁷

Although these powers may have indicated the inchoate emergence of new patterns of authority among the Teda, they probably did not qualify the Teda as a political community having sovereign rights over the land inhabited by the various Teda clans. The fact remains that Chai still could not bind separate clans or individuals by his actions, and even the most liberal view of native sovereignty permitted the occupation of lands whose inhabitants lacked the social structure to conclude a binding treaty. Lindley, who favored a broad view of native sovereignty and consequently a narrow view of *terra nullius*, admitted that even Australia, an analogous territory, was *terra nullius* since "no political [indigenous] society to be dealt with" existed when the British arrived.⁹⁴⁸ The anarchic and individualistic Toubou culture certainly fit this description. Assuming that no other power had title to the territory, the land was open to occupation. France accordingly had no obligation to make treaties with the Toubous in order to gain the land.

Even if France had wanted to conclude treaties with Chai, it could not have known that other Teda clans would have respected any agreements. Chai's attitude and policy toward the French, for instance, did not bind the Gounda and the Arna, who pursued their own policies.⁹⁴⁹ Nor did the Daza clans of Borku and elsewhere recognize the *Derde*'s authority to bind them with a treaty, since the *Derde*'s power extended only to the Teda clans. Moreover, the Daza possessed no greater level of organization than the Teda. For example, different factions of the Anakazza adopted their own policies towards the French.⁹⁵⁰ Thus, under any contemporary view of native sovereignty the Toubous did not possess sovereign rights to the Aouzou Strip.

946. See *supra* notes 64-84 and accompanying text.

947. See *supra* notes 85-91 and accompanying text.

948. See *supra* notes 595-596 and accompanying text.

949. See *supra* note 348 and accompanying text.

950. See *supra* notes 334-338 and accompanying text.

2. *The Sanusi*

Libya could similarly argue that the Sanusi presence in northern Chad constituted an effective occupation conferring title on the Sanusiya.⁹⁵¹ As originally conceived at the Congress of Berlin, the principle of effective occupation applied only to states. Although the Sanusi certainly had a visible presence in the area, the brotherhood probably did not qualify as a state. Therefore, if Libya contends that the areas under Sanusi control before the French occupation rightfully belong to Libya, it will have to produce either proof of collaboration between the Sanusi and Turkey amounting to ties of allegiance, or proof that Libya inherited the Sanusi title from King Idris, the leader of the brotherhood.

The Sanusiya was a religious organization, but the movement also exercised some political control over its areas of operation. The Sanusiya's achievements and rapid spread in the Sahara evidence its influence. In seeking to revive and spread Islam and to distance themselves from the Ottomans, the Sanusi founded their *zawiyahs* in areas where the Turks lacked control and where they could substitute their own authority.⁹⁵² The social and political condition of Tibesti, Borku, and Ennedi forced the Sanusi to create authority structures previously unknown to the area. They brought order to the caravan routes between the Libyan coast and the Chadian interior, helped to organize resistance to French expansion, and collected tithes from the local populations.⁹⁵³ They even exercised enough influence to enlist some Toubous in raids against the French.⁹⁵⁴ The Sanusi were also able to control raiding among the different groups, particularly between the 'Awlad Sulaiman and the Toubous.⁹⁵⁵ Had these acts been performed by a state, contemporary international law probably would have recognized them as sufficient to confer sovereignty, especially in regions as desolate as Tibesti, Borku, and Ennedi. Furthermore, when Colonel Largeau wrote to the Sanusi leaders at Kufrah in 1913 to specify his conditions for coexistence, he implicitly acknowledged them as the former rulers of the area.⁹⁵⁶

951. Cf. Joffé, *supra* note 2, at 48.

952. See ROSSI, STORIA, *supra* note 161, at 335.

953. See *supra* notes 227-255 and accompanying text.

954. See *supra* note 261 and accompanying text.

955. See *supra* note 230 and accompanying text; WRIGHT, CENTRAL SAHARA, *supra* note 26, at 91; Mangin, *supra* note 246, at 181; see also DUVEYRIER, *supra* note 217, at 44. Nachtigal reported that the head of the *zawiyah* in Kavar oversaw the oasis, brought economic and cultural benefits from the caravan trade, and protected the inhabitants against the 'Awlad Sulaiman. WRIGHT, CENTRAL SAHARA, *supra* note 26, at 92. Rosita Forbes, noting the lawlessness of the Zawiyah Arab tribe in Fazzan, marvelled at the ability of the Sanusi to preserve order: "only a power as great as the Senussi could hold them in check." FORBES, *supra* note 181, at 206.

956. See Letter of Colonel Victor-Emmanuel Largeau to the Sanusi Leadership (Dec. 31, 1913), in FERRANDI, *supra* note 18, at 242-44.

On the other hand, the Sanusiya's success in coordinating the various local tribes and clans to resist the French does not necessarily imply that the Sanusi exercised sovereignty over them. The Sanusi did experience some difficulty in holding together this confederation of diverse groups. In 1902, for instance, one faction of the 'Awlad Sulaiman submitted to France while another remained under the Sanusi banner, for reasons similar to the Anakazza's in 1914: their pasture lands were under French control, while their trade and date-harvest migrations took them into Borku, which the Sanusi controlled.⁹⁵⁷ Even though the Sanusi created a rudimentary administrative apparatus and "enforce[d] a measure of peace, security, justice and stability,"⁹⁵⁸ the impact of this administration on the inhabitants, although of crucial importance to the fate of the Aouzou Strip, remains in question. Historians have unearthed little evidence showing that the Toubous ever accepted Sanusi authority. Although the Sanusiya made connections with *Derde Chai*, the brotherhood was unable to make meaningful inroads among the Toubous. For example, Chai did not tolerate Sanusi attempts to encroach on the administration of justice for minor offenses.⁹⁵⁹ Nor did the Toubous make good Muslims. Indeed, Chai himself performed sacrifices in order to bring rain to Tibesti.⁹⁶⁰ Other Toubou animistic practices and rites likewise continued under an Islamic veneer.⁹⁶¹ The Toubous did cooperate with the Sanusi in resisting French expansion, but they clearly cooperated out of self-interest rather than loyalty to the Sanusi. It seems improbable (and the evidence fails to demonstrate) that the independent-minded Toubous, who often defied their own chiefs, ever submitted to Sanusi sovereignty.

Consequently, some historians have concluded that the Sanusiya did not exercise effective authority over the area. Evans-Pritchard, for instance, believed that the Sanusiya simply lacked the organization and machinery to control such wide terrains effectively, especially given the "manifold tribal, racial and cultural divergences."⁹⁶² In addition, interfamilial rivalries after the death of Muhammad al-Mahdi threatened to pull the brotherhood apart.⁹⁶³ The French scholar Ciammaichella agrees, concluding that the breadth of the territory, the difficulty of communications, and the constant anarchy did not

957. CIAMMAICHELLA, *supra* note 228, at 86-87.

958. WRIGHT, CENTRAL SAHARA, *supra* note 26, at 84.

959. *See supra* note 240 and accompanying text.

960. *See supra* note 85 and accompanying text.

961. *See supra* note 216 and accompanying text.

962. EVANS-PRITCHARD, *supra* note 218, at 26.

963. *Id.* The structure of the order, with each *zawiyah* relying on its own resources, encouraged the creation of zones of influence controlled by various members of the Sanusi family. *See id.* at 26-27, 77.

permit Sanusiya's consolidation of political, administrative, and economic control.⁹⁶⁴

If Libya can establish the requisite Sanusi control over the Aouzou Strip, it may be able to claim succession to the Sanusi title through King Idris as head of the movement. The claim would require proof that the Libyan monarchy was intended to be a Sanusi state and that the Sanusi holdings accordingly became the dominion of Libya. The argument, however, finds no factual support. As one historian has noted, "to Idris the monarchy and the leadership of the Sanusi Order were two distinct and separate institutions." Idris's attitude toward succession proves the point: whereas any member of the Sanusi family was eligible to become head of the Sanusiya after him, the crown could devolve only upon a member of his branch of the family.⁹⁶⁵ The monarchy thus did not possess the necessary connection to the leadership of the order. Furthermore, the history of the formation of the Libyan state shows that Libya arose from the independent provinces of Cyrenaica, Tripolitania, and Fazzan. Despite Idris's prominent role in this process, the Sanusiya as a political organization played no formal part in the creation and constitution of the Libyan state.⁹⁶⁶

In summary, Libya will face an uphill struggle in claiming the Aouzou Strip under a theory of effective occupation based on the presence and activities of the Sanusiya. Even if Libya convinces the Court that the Sanusi effectively occupied the region, Libya will still have to establish some link by which it succeeded to the claims of the Sanusiya. Demonstrating this link will be difficult, since the Sanusiya was not an independent state and the Libyan monarchy was not a Sanusi state.

3. The Ottoman Presence Under Traditional Principles

Libya might also argue that the Aouzou Strip was under the sovereignty of the Ottoman Empire. If it establishes this point, Libya could then claim the territory as Turkey's successor. This argument avoids the difficulty of establishing the means of succession that plagues Libya's claims based on the Sanusi

964. CIAMMAICHELLA, *supra* note 228, at 131; see also André Martel, *Aux origines de l'Etat Libyen: La porte et la Sanusiya au Sahara: 1835-1922*, in ENJEUX SAHARIENS 233 (stating that even by 1951 in Cyrenaica, Sanusiya was not state, despite para-state institutions and role in resisting Italian invasion). Wright, while acknowledging the Sanusi predominance in Cyrenaica, concludes that the degree to which the order exercised control outside that region is "much more problematic." WRIGHT, CENTRAL SAHARA, *supra* note 26, at 91. Others have said that the impact of the Sanusiya is "infinitely more difficult to unearth" than other historical factors. Lemarchand, *A propos du Tchad*, *supra* note 1, at 21.

965. WRIGHT, LIBYA, *supra* note 343, at 81. This fact also undermines the assertion that the Sanusiya constituted a state. If the control of the Sanusi lands could pass from the crown through a differential succession, the Libyan state would have to split. Therefore the Sanusiya could not have possessed sovereign title to the lands where it exercised its influence.

966. See *infra* notes 868-873 and accompanying text.

presence. Viewed under traditional criteria, however, the demonstration of Turkish authority in the region was weaker than that of the Sanusi. Libya has a stronger case with regard to hinterland theories and *Western Sahara*-type arguments.

Yet even if Turkey's actions in the area did amount to effective occupation, Turkey subsequently abandoned the region, thereby forsaking its sovereign rights to the land. When France occupied the region, Italy, the successor of Turkey, did not even bother to protest. If Turkey ever had valid title, it nevertheless lapsed, thereby enabling France to secure title to the area against possible advances by Italy or its successors.

a. *Acts of Occupation*

As recently as December 1990 Colonel Qaddafi asserted that Chad had constituted a part of the Ottoman Empire. In a message congratulating Idris Deby for overthrowing Qaddafi's nemesis, Hissène Habré, Qaddafi commended Deby on his "splendid triumph over the gang of ignorance and lack-eyes" that "crowned" the

bloody historic epic in which the Iliad of freedom and the permanent brotherhood between the two fraternal peoples were written in Libyan and Chadian blood. Every inch of Chadian soil was smeared with the blood of your Libyan brothers since the Ottoman era, during which we were united in one single state, to the resistance of the odious French colonisals [sic].⁹⁶⁷

Colonel Qaddafi can invoke some historical facts to support his hyperbolic prose. The Turks had eyed Tibesti, Borku, and Ennedi for a long time. After retaking control of Tripolitania from the Karamanlis in 1835, the Ottomans centralized their authority over their Libyan lands, making the *sancaks* of Cyrenaica and Fazzan directly dependent on Constantinople. The Ottomans further divided the *sancaks* into *kazas*, each under its own *kaymakam*, and created in Fazzan a *kaza* for the Toubous with its capital at Bardai.⁹⁶⁸ The *kaza* of the Toubous has attracted little attention in the Aouzou Strip debate, and it seems to have lapsed until 1907.

At this point, the Turks still had not succeeded in penetrating beyond Fazzan. The Toubous badly defeated a force of Fazzanese sent by the Ottoman governor of Fazzan in 1906.⁹⁶⁹ Shortly thereafter, however, Turkey's fortunes began to change. Perhaps sensing the inevitable, Chai Bogarmi journeyed to Murzuk and accepted a nomination as *kaymakam* of the Toubous. Two

967. *Libyan Leader Sends Message of Congratulations to Idriss Deby* (BBC Summary of World Broadcasts, Dec. 7, 1990), available on LEXIS, Nexis Library, Wires File. In the Security Council debate on the Aouzou Strip in 1983, Libya asserted that its boundaries "during the Ottoman era were at the city of [Faya]." 2419th Meeting, *supra* note 485, at 26 (statement of Mr. Treiki).

968. ROSSI, STORIA, *supra* note 161, at 322-23.

969. See *supra* note 273 and accompanying text.

Turkish soldiers accompanied him back to Bardaï.⁹⁷⁰ In 1908, Osman Efendi arrived in Bardaï with a small detachment of Turkish soldiers and became *kaymakam*. The Turks constructed a barracks and some fortifications.⁹⁷¹ In 1911-1912, Captain Ahmed Rifki camped his detachment outside Ain Galakka in Borku before returning to the coast to fight the Italian invaders.⁹⁷² After his departure the Turkish lieutenant he left behind made some efforts to extend Ottoman sovereignty over Ennedi.⁹⁷³ Viewed as a whole these acts probably sufficed under the international law of the time to confer at least an inchoate title on Turkey.⁹⁷⁴

Libya can also argue that various indigenous groups in the area perceived themselves as subject to Turkish sovereignty. In 1912, for instance, the chief of one Toubou clan, seeking to prevent French reprisals for certain disturbances, wrote a letter to Colonel Largeau in which he invoked the Franco-Turkish friendship and stated that "we are dependent upon the Ottoman government and follow the Turks."⁹⁷⁵

On the other hand, the Turkish actions may have been vain gestures that created an appearance of occupation without actually securing the submission of the Toubous. The Toubous' traditional hostility to foreign domination suggests that they would not voluntarily have surrendered any real liberty to the Turks. Some commentators have asserted that the Turkish administration had "no lasting effects upon the local population."⁹⁷⁶ Others with significant experience among the Toubous reported that the Toubous attacked the withdrawing Turks.⁹⁷⁷ Such statements undermine the proposition that the Turkish presence was sufficient to maintain order and to protect life and property as the law required.

In any event, the Turks were present in sizeable numbers for only a few months. The evidence suggests that during that time the Sanusi insisted on

970. See *supra* notes 275-278 and accompanying text. The Young Turk government announced in 1911 that the "sovereign" of Tibesti (evidently Chai) "has, in relation to us, the situation of a national very much disposed to execute our orders." See Dorobantz, *supra* note 289, at 366. In the absence of proof, however, this statement is best seen as an inflated boast, since Chai on other occasions jealously guarded his prerogatives against external usurpation.

971. See *supra* notes 285-289 and accompanying text.

972. See *supra* notes 297-316 and accompanying text.

973. See *supra* notes 317-318 and accompanying text.

974. See McKeon, *supra* note 651, at 160. In fact, French writers at the time recognized Turkey's actions as "acts of authority" and criticized them as hostile in light of France's well-known designs on the region. See de Caix, *supra* note 288, at 88; Dorobantz, *supra* note 289, at 364 (discussing article in *Le Temps* criticizing Turkish actions). Clearly, then, the French felt that Turkey's acts could prevent France from acquiring sovereignty over the area.

975. See Telegram from Colonel Victor-Emmanuel Largeau to French Ministry of Colonies (July 21, 1912), in CIAMMAICHELLA, *supra* note 228, at 155. The sincerity of the statement is questionable, since it was obviously in the self-interest of the Toubou chief to tell Largeau that he was under Ottoman protection.

976. Fisher & Fisher, *supra* note 240, at 425-26.

977. CHAPELLE, NOMADES NOIRS, *supra* note 15, at 64; cf. ROUARD DE CARD, LE DIFFÉREND, *supra* note 357, at 48-49.

remaining in control and prevented the Turkish soldiers from performing any acts of administration. Furthermore, the Ottoman Empire's evacuation of its troops in 1912 and subsequent renunciation of its rights in the region clearly showed both the *corpus* and *animus* necessary for abandonment.⁹⁷⁸ Therefore it makes little difference whether the Turks actually acquired sovereignty over the area. Once they abandoned it the territory reverted to its previous state of *terra nullius*, and France was free to occupy it. Turkey's failure to protest the subsequent French occupation lends additional support to an inference of abandonment.

b. Succession to Turkish Rights

Demonstrating a Turkish presence is only half the argument. Libya must still establish some means by which it succeeded to Turkey's rights. It will most probably rely on a theory of state succession.

Libya is not the first to claim the benefit of the Turkish presence in northern Chad. In the 1920s Italy claimed to succeed to Turkey's rights, arguing that France had "occupied regions over which Turkey, until our occupation of Libya, had exercised effective sovereignty: Borku, Tibesti, Ounianga, and Erdi."⁹⁷⁹ Italy claimed that it had inherited the full extent of the Ottoman lands in Libya by virtue of the Treaty of Lausanne.⁹⁸⁰ However, Italy had agreed in the 1902 Barrère-Prinetti Letters that France could extend its possessions up to the line marked in 1899. By eliciting this promise from France, Italy necessarily agreed in turn that France could acquire sovereign rights in the entire area south of the line.⁹⁸¹ If Turkey possessed rights in that area, Italy had effectively compromised them in 1902.

Libya, in contrast, was an entirely new entity, a creation of the United Nations. It did not directly succeed Italy. Rather, interim French and British administrations succeeded Italy after the conquest of Libya in World War II.⁹⁸² These circumstances could complicate Libya's claim to the Aouzou Strip through Turkish and Italian succession.⁹⁸³ These technical difficulties, however, are unlikely to defeat an otherwise reasonable claim.

978. See McKeon, *supra* note 651, at 160.

979. *Les frontières méridionales*, *supra* note 357, at 42-43 (quoting former Italian Ambassador Tommaso Tittoni). Beginning in 1927 Italy published maps of its Libyan colony without a southern boundary, see *Les aspirations italiennes vers le Lac Tchad*, 38 B.C.A.F. 159, 159 (1928) [hereinafter *Les aspirations italiennes*], arguing that the line fixed in 1899 and 1919 was "not a boundary line, but a limit of zones of influence." *Les frontières méridionales*, *supra* note 357, at 43; see also *Les aspirations italiennes*, *supra* note 979, at 160.

980. Treaty of Lausanne, *supra* note 318, at 160-63.

981. See *supra* notes 806-809 and accompanying text.

982. See generally L'ANNE, *supra* note 11, at 177-95.

983. 2419th Meeting, *supra* note 485, at 71 (statement of Mr. Treiki).

Yet if the Court applied the decolonization norm, the Turkish occupation would become very relevant to the current dispute. Since the Turks evacuated the region in response to an illegitimate action (the Italian invasion of Libya), and since France's occupation constituted another illegitimate action, the decolonization norm would demand that the Aouzou Strip—indeed, the full extent of the land controlled by the Ottomans—be returned to Libya as the successor of Turkey.

c. Turko-Sanusi Cooperation

Libya may also argue, as Morocco did with regard to Ma al-Aineen in *Western Sahara*,⁹⁸⁴ that the Sanusi functioned as agents of the Ottoman governors in Tripoli, effectively extending Ottoman sovereignty over Borku, Tibesti, and Ennedi. Libya could then claim the Aouzou Strip as Turkey's successor. The argument would enable Libya to embrace the Sanusi presence in the area while avoiding the problem of finding a means of succession from the Sanusi. Under I.C.J. precedent, Libya must show more than a simple convergence of interests between the Sanusi and the Turks in order to establish the Sanusiya as an instrument of the Ottoman Empire. To prove that the Sanusi truly acted as Ottoman agents, Libya must demonstrate a relationship of subordination, not merely of equality.⁹⁸⁵ The evidence, however, does not support this contention. While the Sanusi and the Ottomans did partially cooperate in Tibesti, Borku, and Ennedi, the cooperation was based on common interests, not allegiance. Moreover, the Sanusi insisted on maintaining a degree of independence that is completely inconsistent with claims of Turkish domination. Libya must also prove that the Sanusi exercised a sufficiently strong influence over northern Chad to constitute sovereignty. The available evidence on this point does not conclusively support this position.

(1) The Turko-Sanusi Modus Vivendi in Cyrenaica

The Sanusi and the Turks certainly were wary of each other. The Turks mistrusted the Sanusi as a potential threat to their authority, and the Sanusi viewed the Turks as poor Muslims.⁹⁸⁶ In fact, some historians have suggested that the order deliberately established its headquarters in the desert and twice moved south to avoid Ottoman control.⁹⁸⁷ Others have argued that the reloca-

984. See *supra* notes 726-727 and accompanying text.

985. See *infra* notes 726-730 and accompanying text.

986. EVANS-PRITCHARD, *supra* note 218, at 71; Rossi, *Penetrazione*, *supra* note 161, at 162; see also HACHAÏCHI, *supra* note 217, at 106; WRIGHT, *CENTRAL SAHARA*, *supra* note 26, at 118; *supra* notes 223-226 and accompanying text.

987. See *supra* notes 218-220 and accompanying text; ZIADEH, *supra* note 217, at 59-60.

tions mainly reflected the Sanusiya's interest in spreading its message south and in preventing French expansion.⁹⁸⁸

Despite their mutual suspicions, the Sanusi and the Turks benefitted from a tacit understanding of non-interference. The Turks knew that the Sanusi would support Turkey against the European powers. Likewise, the Sanusi must have known that the Ottoman Empire alone could protect Muslim interests.⁹⁸⁹ The common interest in order, security, and trade in the interior allowed the Sanusi and the Turks to reach a *modus vivendi*.⁹⁹⁰ The Turks "had neither the will nor the resources to govern the interior,"⁹⁹¹ and they knew that the Sanusi, with their extensive network of *zawiyahs* among the Bedouin tribes, could best procure the cooperation of the tribes.⁹⁹²

Consequently, in Cyrenaica, where the Sanusiya enjoyed the strongest support, the Turks permitted the Sanusi to control the interior and to perform many governmental functions, "so long as taxes were paid[,] no overt act was committed against the Sultan's authority . . . and [Cyrenaica] sent its annual tribute to Istanbul."⁹⁹³ The Sanusi thus became "*de facto* rulers of the country under nominal Turkish sovereignty,"⁹⁹⁴ and the Sanusiya developed into "a proto-state with an embryonic government of its own."⁹⁹⁵ It is important to remember, however, that this relationship operated mainly in the Cyrenaican interior, whose proximity to the coast led the Ottomans to place a premium on maintaining order there, and where the extensive Sanusi network provided a means by which the Sanusi could perform governmental functions. Neither of these conditions existed elsewhere.

(2) Attempts to Extend Cooperation Southward

Although the Sanusi presence was not as strong as in Cyrenaica, the Ottomans hoped to use the Sanusi presence deep in the desert to counter French expansion. Sultan Abdülhamid II (1876-1909) took a special interest in the Sanusiya and made several overtures in an effort to further his Pan-Islamic policies. In 1890, at the Sultan's bidding, the *vali* (governor) of Cyrenaica visited the Sanusi headquarters at 'al-Jaghbub and met with Muhammad al-Mahdi.⁹⁹⁶ The following year the Sultan sent one of his aides,

988. See MARTIN, *supra* note 235, at 113. See also EVANS-PRITCHARD, *supra* note 218, at 15-16, 22; HACHAÏCHI, *supra* note 217, at 114-15; Martel, *supra* note 964, at 235.

989. EVANS-PRITCHARD, *supra* note 218, at 92.

990. See *id.* at 98.

991. WRIGHT, LIBYA, *supra* note 343, at 13.

992. EVANS-PRITCHARD, *supra* note 218, at 97-98.

993. *Id.* at 93.

994. WRIGHT, LIBYA, *supra* note 343, at 13; see also ROSSI, STORIA, *supra* note 161, at 335.

995. EVANS-PRITCHARD, *supra* note 218, at 99.

996. ZIADEH, *supra* note 217, at 62.

Sadiq al-Mu'ayyad al-°Azm, to 'al-Jaghbug directly from Constantinople.⁹⁹⁷ In September 1895, after Muhammad al-Mahdi had moved the Sanusi headquarters to Kufrah, the Sultan sent him a letter reiterating his authority as leader of the Islamic world and urging the Sanusi leader to support Muslim unity and resist European encroachment.⁹⁹⁸ In November the Sultan wrote again to Muhammad al-Mahdi, informing him of a *firman* (imperial decree) instructing the Ottoman *valis* of Tripolitania and Cyrenaica to respect the Sanusiya's agents and to observe strictly the privileges granted in previous *firman*s.⁹⁹⁹ Shortly thereafter, in November 1895, Sadiq al-Mu'ayyad al-°Azm made another visit to the Sanusi at Kufrah, conferred with Muhammad al-Mahdi, and returned to Constantinople with a letter for the Sultan from the Sanusi leader.¹⁰⁰⁰ Another envoy from the Sultan visited Gouro in 1899.¹⁰⁰¹

This pattern of activity suggests that Abdülhamid increasingly sought to develop ties with the Sanusi and to enlist them in the resistance to French advances in the Sahara. Initially, however, the Sanusi did not seem to desire close cooperation. They would not permit the Turkish flag to fly at 'al-Jaghbug or Kufrah, nor would they allow Turkish representatives to reside there.¹⁰⁰² However, the French advance into Ouadai and the threat of an Italian invasion brought the Sanusi and the Turks closer together.¹⁰⁰³ Small Turkish forces arrived in Tibesti and Borku soon afterward.¹⁰⁰⁴ The Sanusi now sought to "proclaim Ottoman sovereignty in the Sahara" in order to deter French attacks on their *zawiyahs* and to gain access to the Turks' diplomatic facilities in order to protest French aggression. They acted purely out of self-interest, however, not out of loyalty to the Sultan. They sought to use the Turks as a shield against France, and they were unwilling to compromise their independence even by recognizing purely formal Turkish sovereignty over the area. For example, when Turkish officials arrived at Kufrah in 1908, they were not permitted to raise the Ottoman flag or reside in the oasis due to protests by the Sanusi and the Zawiyah, the local Arab tribe.¹⁰⁰⁵ °Abd-Allah Tuwwar's

997. *Id.* at 63; see also Rossi, *Penetrazione*, *supra* note 161, at 162. According to Rossi, this visit occurred in 1886, rather than 1891. *Id.*

998. ZIADEH, *supra* note 217, at 63-64.

999. *Id.* at 64. The Sanusiya benefitted from two imperial *firman*s exempting its property from taxation and permitting the order to collect tithes from its followers and to grant sanctuary. *Id.* at 61; EVANS-PRITCHARD, *supra* note 218, at 91-92.

1000. ROSSI, STORIA, *supra* note 161, at 343; ZIADEH, *supra* note 217, at 64; Rossi, *Penetrazione*, *supra* note 161, at 163; see also HACHAÏCHI, *supra* note 217, at 105-06.

1001. Martel, *supra* note 964, at 237.

1002. EVANS-PRITCHARD, *supra* note 218, at 102.

1003. CIAMMAICHELLA, *supra* note 228, at 120.

1004. See *supra* notes 285-305 and accompanying text.

1005. *Id.*; see also *supra* notes 283-284 and accompanying text; WRIGHT, CENTRAL SAHARA, *supra* note 26, at 118. Evans-Pritchard puts the date at 1910, not 1908. EVANS-PRITCHARD, *supra* note 218, at 102.

refusal to allow Captain Rifki to camp within Ain Galakka also illustrates the defiant Sanusi attitude.¹⁰⁰⁶

(3) *Legal Effects of the Turko-Sanusi Cooperation*

In *Western Sahara*, the I.C.J. ruled on more favorable facts that the activities of Ma al-[‘]Aineen established only a relationship of cooperation, not allegiance or subordination, between Ma and the Moroccan Sultan.¹⁰⁰⁷ Although the Ottoman Sultan undertook various efforts to open channels with them, the Sanusi cooperated only grudgingly. They essentially sought to use the Ottomans to ward off French attacks, but they were unwilling to cede local control to Turkey. The evidence does not establish a relation of authority that would sufficiently demonstrate Turkish sovereignty over the area. Consequently, Libya will probably fail to convince the Court of its entitlement to the Aouzou Strip by arguing that the Sultan dominated the Sanusiya.

4. *Libyan Arguments Based on Non-Traditional Principles*

Although its arguments based on traditional legal principles are unlikely to succeed, Libya could put forth arguments utilizing different criteria of sovereignty. First, Libya could contend, as Turkey argued in 1890 and 1899, that the region was a Turkish hinterland appurtenant to the Tripolitanian coast, and that a lesser presence would therefore suffice to confer title under international law. Second, it could contend that Turkey's actions in the Aouzou Strip were sufficient to create sovereignty as the concept was understood in the context of Islam and the North African geographical, social, and political milieu. Finally, Libya could argue, as Morocco argued with respect to Ma al-[‘]Aineen in *Western Sahara*, that the Sanusi acted as agents of the Ottoman

1006. See *supra* notes 301-305 and accompanying text. A further example appears in the correspondence of [‘]Abd-Allah Tuwwar with the French military authorities in the territory of Chad. In April 1912, [‘]Abd-Allah Tuwwar had written to Col. Largeau, stressing the Sanusi rather than the Ottoman role in negotiating with Bonnel de Mézières for a purported division of Chad between France and the Sanusiya. See Telegram from Col. Victor-Emmanuel Largeau to French colonial administration at Brazzaville (May 30, 1912) (quoting letter from [‘]Abd-Allah Tuwwar dated Apr. 12, 1912 (24 Rabī‘u-al-thani 1330)), in CIAMMAICHELLA, *supra* note 228, at 152, 152-53. Other letters, however, show a greater degree of Turko-Sanusi cooperation. In October 1912, [‘]Abd-Allah Tuwwar, calling himself "Kaymakam of Borku," explained that "we" (the Sanusi and the Turkish government) had detached the Turkish lieutenant to Ennedi with a few *ikhwan* to defend the inhabitants against "troublemakers" and to "protect the caravans." Letter from [‘]Abd-Allah Tuwwar to French commandant of Ouadai (Oct. 1912), in CIAMMAICHELLA, *supra* note 228, at 156, 156-57. A further letter in late October emphasized Turko-Sanusi cooperation in policing Ennedi and protecting the trade routes, and asked France to do the same in its territory. Letter from [‘]Abd-Allah Tuwwar to French commandant of Ouadai (Oct. 26, 1912 (15 Thu-al-qa‘da 1330)), in CIAMMAICHELLA, *supra* note 228, at 158, 158-59.

1007. See *supra* notes 728-730 and accompanying text.

Empire, and that the Sanusi actions accordingly extended Turkish sovereignty in the region.

a. *Turkish Claims to the Region as a Hinterland*

Libya may rely on the related argument that the Aouzou Strip constituted a Turkish hinterland. In 1890 Turkey claimed a hinterland extending as far south as Lake Chad, maintaining that control of trans-Saharan trade was essential for developing the Libyan coast.¹⁰⁰⁸ Turkey made the same argument in protesting the 1899 Declaration. The hinterland claimed by Turkey arose from entitlements based on ancient historical rights and geographical and social unity with the Libyan coastal regions.¹⁰⁰⁹ French commentators argued that such claims lacked juridical validity, and they carefully distinguished the Turkish hinterland from the sphere of influence (which they called the true "hinterland") created by treaties with other states. Valid hinterlands, as the French authors used that term, arose only from international accords; international law did not permit a state to claim a hinterland by unilateral action.¹⁰¹⁰

Italy revived the Turkish claim to the Tripolitanian hinterland in the 1920s on the grounds that it inherited the area as successor to the Ottoman Empire in Libya.¹⁰¹¹ Like Turkey, Italy based its claims to the region on the importance to Libya of trans-Saharan trade.¹⁰¹² In support of this argument, Italian colonialists presented evidence that virtually all of the trans-Saharan caravaners agreed that Ain Galakka belonged to Tripoli.¹⁰¹³

While the Porte clearly asserted lesser rights than full sovereignty under European standards, Turkey nevertheless argued that the area was under its sovereignty according to its understanding of the term. Turkey invoked a series of activities that support the claim:

military excursions; sending of civil functionaries, magistrates and religious personages, numerous caravans leaving periodically for those countries from Tripoli, and returning there; prosperous commerce; mention of the name of His Imperial Majesty the Sultan in public prayers of an immense, almost exclusively Muslim population . . . these are . . . some of the circumstances denoting the multiple ties, material and moral, that have existed for all time between the populations of these regions and the authorities of Tripolitania.¹⁰¹⁴

1008. BOUQUET, *supra* note 174, at 58.

1009. *See supra* note 260 and accompanying text.

1010. *See* Mangeot, *supra* note 211, at 326.

1011. *See id.*; *see also* Joffé, *supra* note 2, at 33-34; *Les aspirations italiennes*, *supra* note 979, at 160-61.

1012. *See Les aspirations italiennes*, *supra* note 979, at 161; *see also L'Arrangement*, *supra* note 260, at 145.

1013. *Les aspirations italiennes*, *supra* note 979, at 161.

1014. Letter from Münir Bey, Turkish Ambassador to France, to Théophile Delcassé, Minister of Foreign Affairs, May 19, 1899, in 15 D.D.F. (ser. 1) No. 179, at 293, 297 (1959).

France completely rejected these claims, but it also completely misunderstood them. France construed them within a traditional Western framework, not within the Islamic milieu that the Sultan intended. In the margin by the words "religious personages," someone at the Ministry of Foreign Affairs, perhaps Delcassé, had written, "that's not a title."¹⁰¹⁵ Likewise, in the margin by a passage mentioning the Sultan's name, someone had written, "[b]y the same argument, the Pope could claim the sovereignty of half the world. . . . France cannot accept that the Sultan claims that the Muslim religion of this or that population creates for him any right over [that population]."¹⁰¹⁶ These comments suggest a complete misunderstanding of the Sultan's position within the Islamic world, where religious authority is inseparable from secular authority.

The Turks expressed their claims in terms of a hinterland because the concept apparently best embodied the relationship they intended to convey. Unfortunately, they misunderstood the Western legal implication of the hinterland term. As noted in part IV above, territorial claims based on geographical proximity or necessity enjoyed an uncertain status under late nineteenth and early twentieth century international law.¹⁰¹⁷ Scholars disfavored such claims, but the practice of states showed that the hinterland created a presumption of title in the absence of competing claims.¹⁰¹⁸ Although Turkey's protests against the Franco-British agreements of 1890 and 1899 probably kept Turkey's claim alive, the hinterland argument was strongest when no other state asserted a competing claim to the territory. France and Britain recognized Turkey's rights to a certain hinterland in 1890 and 1899, but they did not think that it extended as far south as Tibesti, Borku, and Ennedi. Judging from the Ottoman attempts to establish sovereignty over the Toubous during this period, the Turks did not believe that they possessed sovereignty over those areas either.¹⁰¹⁹

The Turkish claims applied nineteenth-century European concepts to a realm beyond their traditional operation. Struggling to voice its protest in terms that were both comprehensible and persuasive, Turkey chose the closest analogy: the hinterland doctrine. Yet the hinterland theory simply could not encompass Turkey's relationship with the interior populations and the nature of the rights engendered by this relationship.¹⁰²⁰ The hinterland was based

1015. *Id.* at 297 n.*.

1016. *Id.* at 297 n.**. Delcassé made identical remarks in a formal response delivered to Turkey shortly thereafter. See Dispatch from Théophile Delcassé, Minister of Foreign Affairs, to Ambassador Constans, May 29, 1899, in 15 D.D.F. (ser. 1) No. 191, at 317-18 (1959).

1017. France, in particular, vigorously denied that the concept had any validity. See Dispatch from Théophile Delcassé, Minister of Foreign Affairs, to Ambassador Constans, May 29, 1899, in 15 D.D.F. (ser. 1) No. 191, at 317-18 (1959).

1018. See *supra* notes 628-651 and accompanying text.

1019. See *supra* notes 205, 270 and accompanying text.

1020. Scholars have recognized that Turkey was at a disadvantage in seeking to resist the European advance by invoking European legal principles utterly foreign to the region in question. Cf. WRIGHT,

upon a concept of a reasonable territorial appurtenance; Turkey's arguments really relied on personal relationships, which had no necessary connection with territory. Turkey's protests thus rested on, but failed to express, a notion of sovereignty different from the concept that applied in the West.

b. *Arguments Based on the Special Characteristics of the Area and Its People and the Nature of the Ottoman State*

The inability of the hinterland theory to capture and express Turkey's arguments suggests an alternative argument departing from the nineteenth-century legal concepts that handcuffed the Sultan. Libya, in an argument recalling Morocco's pleadings in *Western Sahara*,¹⁰²¹ could urge the Court to evaluate the Ottoman presence under the notions of sovereignty appropriate to the Central Sahara, rather than the Western standards that developed in a far different geographical and social milieu. In particular, Libya could argue that territorial concepts of sovereignty make little sense in the vast, barren stretches of the desert. Instead, because Saharan society is largely nomadic, sovereignty is more personal and communal: it moves with the person or group rather than remaining fixed on the ground. Libya could draw an analogy between the Toubous and the Bedouin tribes of Cyrenaica, arguing that the Ottomans essentially replicated with the Toubous the governance structures they had used to bring the Bedouin under their sovereignty. Finally, Libya could argue that by virtue of the Ottoman Sultan's status as supreme religious and secular leader, religious allegiance necessarily implied political allegiance as well. Thus, Turkey exercised sovereignty over northern Chad even though its displays of state authority might not have sufficed under a Western understanding of that term.

(1) *Non-Western Standards of Sovereignty*

Libya could contend that "the original indigenous assumptions over the basis of division of sovereign political authority"¹⁰²² did not require the same degree of state authority prevailing in Europe, and that the local populations recognized the authority of the Sultan by virtue of his position alone.

If Libya can persuade the Court to apply the concepts of sovereignty that the inhabitants of the area themselves applied, its chances for success increase significantly. The physical and human realities of the region, including the existence of scattered nomadic peoples roaming over vast expanses of territory,

LIBYA, *supra* note 343, at 18-20 (discussing problem of creating boundaries in regions that had never known them).

1021. See *supra* notes 710-724 and accompanying text.

1022. Joffé, *supra* note 2, at 29.

arguably compelled different methods of governing and different forms of ties between peoples and their sovereign. Such peoples could not be governed from a fixed point or by an outsider. Libya could contend that by inducing Chai to accept an Ottoman stipend, flag, and soldiers, and by creating a *kaza* especially for the Toubous with Chai as its *kaymakam*, the Turks employed the means that were most suited to the physical and political realities of the region. The Turks themselves believed that this relationship made the *Derde* their vassal.¹⁰²³

(2) *The Bedouin Analogy*

To support this position Libya can argue that the Ottomans sought to establish sovereignty over the Toubous by methods similar to those used on the Bedouin tribes of Cyrenaica, whose tribal structure was not markedly different from that of the Toubous, and whom other states widely acknowledged as subjects of the Sultan. If the methods worked in one case, the argument goes, it should work equally well to create a relationship of sovereignty in the other.

The structure of Bedouin society, with its divisions into tribes and tribal sections, paralleled that of the Toubous.¹⁰²⁴ The Bedouin chiefs, like their Toubou counterparts, possessed "precarious authority" that rested "not on force but on the renown and esteem they enjoy[ed] in the tribe." The similarities continue: the Bedouin chief "was chosen for his age and wisdom or for his prowess," and he acted as a dispute arbiter, diplomat, war commander, and special liaison to the Turks.¹⁰²⁵ Moreover, the Bedouins, like the Toubous, were nomadic, and "the necessities of Bedouin life . . . imposed a recognition of individual rights without regard to tribal affiliations or social status,"¹⁰²⁶ just as clan affiliation meant very little among the Toubous. Finally, the

1023. In 1911, the Young Turk government asserted that the "sovereign" of Tibesti "has, in relation to us, the situation of a national very much disposed to execute our orders." See *supra* note 970; see also Jacques Latrémolière, *Tchad: Le lent cheminement des evidences*, MARCHÉS TROPICAUX, Jan. 4, 1985, at 9. Latrémolière also asserts, incorrectly, that the *Derde* "had his residence" in Tripoli. *Id.* at 9. Although this was perhaps true when Oueddei Kichidemi fled Chad in the late 1960s, it was not true during the Turkish period.

1024. EVANS-PRITCHARD, *supra* note 218, at 46. The Bedouins probably possessed greater internal cohesion than the Toubous, however. Although Evans-Pritchard described "a system of balanced opposition between tribes and tribal sections" such that "there cannot therefore be any single authority in a tribe" (reminiscent of the Toubou clan structure), the Bedouin divisions did possess some capacity to "act corporately," a trait that rarely existed among the Toubous. See *id.* at 59. Nevertheless, the Bedouin use of the extended family unit produced similar internal fighting and feuding that marked Toubou society. See *id.* at 56.

1025. *Id.* at 60.

1026. *Id.* at 54.

Bedouin system of assigning land and other resource rights resembled the structure used by the Toubous.¹⁰²⁷

The system the Ottomans developed to govern the tribes suited this milieu well. The authorities in Tripoli appointed *müddürs* (*mudirs*), officials who served as liaisons for each Bedouin tribe, "since the tribes and their sections are the fundamental social departments of the country."¹⁰²⁸ (The practice brings to mind the Moroccan Sultan's use of *qa'ids* as representatives to the Western Saharan tribes.¹⁰²⁹) The Turks also used the Sanusi as intermediaries in their dealings with the Bedouin. The Sanusi, in turn, developed their own system for interacting with the tribes: they constructed a separate *zawiyah* for each tribe, and the leader of the *zawiyah* represented the order in dealing with his assigned tribe.¹⁰³⁰

If the Bedouin social and political structure resembled the Toubou system, and the Turks and Sanusi successfully developed institutions of control in accordance with that structure, then the same structure and the same Turko-Sanusi cooperation should have brought the Toubous under Turkish sovereignty as well. This line of reasoning is appealing, but it is not invulnerable. A Bedouin chief, although lacking absolute power, enjoyed much more authority within his tribe than his Toubou counterpart. In reality, the Toubou chief lacked any power at all to bind clan members. Moreover, the Toubou clan did not function as a cohesive social unit. Its members virtually never gathered together at the same place and time; instead, individual members were more likely to be interspersed with members of other clans than with members of their own clan. Chad can thus argue that although the Toubou clan system superficially resembled Bedouin society, the lack of Toubou cohesion rendered the clan an inadequate administrative structure.

(3) *Religious Cohesion*

Libya need not limit its argument to the political plane. The Sultan and the populace also interacted within the "religious dimension."¹⁰³¹ Libya can argue that the spread of Islam among the Toubous necessarily created a further dimension of allegiance to the Sultan as their spiritual leader, and that acknowledgment of the Sultan's religious authority implied acceptance of his

1027. Compare *id.* at 55 with *supra* notes 61-62, 97 and accompanying text.

1028. EVANS-PRITCHARD, *supra* note 218, at 94.

1029. See Western Sahara, 1975 I.C.J. 12, 45-46 (Oct. 16).

1030. See *id.* at 70-73, 80, 97-98. "[The] Sanusiya kept its cohesion and developed into a political organization [in Cyrenaica] largely because it was identified with the tribal system of the Bedouins." *Id.* at 84.

1031. Lemarchand, *A propos du Tchad*, *supra* note 1, at 21.

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political authority.¹⁰³² Western observers have not always appreciated the power and extent of the religious dimension of Islam.¹⁰³³ As Morocco argued in *Western Sahara*, religious allegiance necessarily implies some degree of political allegiance. Libya could apply the same argument to the Aouzou Strip dispute.

Libya can contend, as Italian historians have indicated, that beginning with the middle of the nineteenth century, the Ottoman Sultan's authority was recognized in Tibesti, "even if not in a definite or continuous manner."¹⁰³⁴ Even further south, in Sudanic regions, the population displayed affection toward the "Great Caliph" Abdülhamid.¹⁰³⁵ Establishing this kind of relationship with certainty is difficult, however, since the Sultan's authority waned with distance, and even the tribes within the limits of the *vilâyet* did not display "total adhesion to the Porte."¹⁰³⁶ Yet "total adhesion" is not what the Libyan argument requires. Libya need only prove the existence of relations adequate and appropriate to the characteristics of the area and its inhabitants.

Nevertheless, Libya's task will not be easy. Some have concluded that the tribes of the "large, if shadowy, hinterland of Tripoli, largely Islamized and extending far into Africa, might well have accepted the Sultan's rule" had the Sultan pursued such a course.¹⁰³⁷ But evidence of the Sultan's actual political authority is scant: "if the tribes . . . of the central and eastern Sahara prayed for the Sultan-Caliph at Constantinople, this spiritual supremacy was about all the allegiance [this Commander] of the Faithful could exact."¹⁰³⁸

(4) Summary

Libya must establish that the Sultan's relations with the Toubous sufficed to create sovereign ties when measured against the appropriate standard. That standard must take into account the geographical and political conditions of the Sahara; it must also take into account the nature of the Islamic state. Yet even if Libya can prove that Turkey's activities established sovereignty under this standard, it still must convince the I.C.J. to apply that standard. Herein lies Libya's greater challenge. The Court in *Western Sahara* was reluctant to

1032. Libya can argue that the Karamanlis in Tripoli attracted similar allegiance. They used the title *amir al-mu'minin*, or "commander of the faithful," a title usually reserved for great Muslim leaders like the Sultans of Morocco and Turkey. The term generally denotes plenary domestic power, and it suggests a kind of autocratic permanence. C.R. Pennell, *Political Loyalty and the Central Government in Precolonial Libya*, in *SOCIAL AND ECONOMIC DEVELOPMENT OF LIBYA* 1, 3 (E.G.H. Joffé & K.S. McLachlan eds., 1982).

1033. See WRIGHT, LIBYA, *supra* note 343, at 20.

1034. Rossi, *Penetrazione*, *supra* note 161, at 165.

1035. ROSSI, STORIA, *supra* note 161, at 343.

1036. Muller, *supra* note 367, at 167.

1037. WRIGHT, LIBYA, *supra* note 343, at 23.

1038. *Id.* at 17-18.

depart from the traditional Western-oriented test of state authority. But if the Court revises this approach in the present dispute, the decision may have enormous and far-reaching implications for African boundaries.

c. Decolonization

Even if Libya establishes that Turkey possessed sovereignty over the Aouzou under a non-traditional understanding of sovereignty, it still must surmount one major obstacle: Turkey's abandonment of the region in 1912.¹⁰³⁹ Turkey's prior title (if any) to the Aouzou Strip would be irrelevant if the abandonment was valid under international law. The area would have become *terra nullius*, and any state, including France, could have acquired title to it. In order to avoid this difficulty, Libya could urge the Court to apply the norm of decolonization, under which the Aouzou Strip would be returned to the state that possessed it at the moment of colonization or to the successor of that state. Libya would then claim the Aouzou Strip as the successor of the Ottoman Empire.

In order to avail itself of this argument, Libya must still demonstrate that Turkey exercised sovereignty over the Aouzou Strip region. If the Aouzou Strip was not under Ottoman sovereignty at the time of colonization, Libya could not gain by the decolonization norm territory that its predecessor never possessed. Libya could not merely assert a claim to the Aouzou Strip based on the similarity of the people inhabiting both sides of the border and their interaction over the centuries. Decolonization works to restore a prior title, not to create a new one.

A claim to the Aouzou Strip based on the decolonization norm would also directly challenge the principle of *uti possidetis*. As noted previously, the African states rejected a revisionist approach in favor of *uti possidetis* in the early 1960s because redrawing boundaries threatened the stability of every state.¹⁰⁴⁰ Nevertheless, revisionist claims based on decolonization have not disappeared; Morocco's claim in *Western Sahara* is a significant example.

The decolonization arguments ultimately highlight the same tensions raised by the case as a whole. Whether the territory was validly open to occupation or not, France took possession of it and performed there the necessary acts to

1039. Turkey could argue that it did not totally relinquish its religious influence in Libya. Under the provisional peace treaty ending the Italo-Turkish War, the Sultan was entitled to appoint a representative in Libya to ensure that the inhabitants respected Muslim law and were able to worship. Provisional Treaty of Peace, Oct. 15, 1912, It.-Turk., art. I, 217 Consol. T.S. 137, 138; *id.* Annex 2, 217 Consol. T.S. at 139-40. Italy promised to assure that "the name of His Imperial Majesty the Sultan, as Caliph, will continue to be pronounced in the public prayers of Muslims" *Id.*, 217 Consol. T.S. at 140. However, these provisions specifically applied only to Tripolitania and Cyrenaica. The Sultan retained no such rights in Fazzan or other regions.

1040. See *supra* notes 739-744 and accompanying text.

establish sovereignty. Over time, French and then Chadian possession of the region became part of the established order. To invalidate that title and restore a title that has been outdated for at least sixty years would wreak havoc with expectations and stability. For these reasons alone the decolonization argument is not likely to have a significant impact on the resolution of the Aouzou Strip dispute.

VI. CONCLUSION

The Aouzou Strip belongs to Chad under current principles of international law. The Court is unlikely to view the alleged cession of 1972, poorly documented and manifestly in violation of Chad's constitution, as a valid basis of title. Libya will therefore have to attack the 1955 Treaty, in which it agreed to accept the boundary drawn in the various colonial agreements on which Chad relies. These agreements placed the Aouzou Strip within French, and later Chadian, territory. Libya can make a strong argument that the 1955 Treaty was the product of coercion, but such an argument may not succeed under the understanding of coercion in use in 1955. Even under the more expansive meaning presently in use, Libya's argument is still at the frontier of the law.

Libya's claims based on the Mussolini-Laval Accords also ultimately have little merit. The failure of France and Italy to exchange ratifications or to complete the convention on Tunisian nationality as required by the terms of the agreement prevented the Accords from entering into force. Additionally, since Italy never took possession of the territory, the cession never became effective. Italy's denunciation of the Accords in 1938 sealed the fate of the agreement. Finally, the 1955 Treaty excluded the Mussolini-Laval Accords from the list of agreements used to draw the boundary between Libya and France's African possessions.

Libya will therefore have to argue that the Aouzou Strip belonged to Turkey, directly or indirectly, and that the French occupation was invalid. Under international standards, however, the area was *terra nullius* when the French arrived. The Toubous did not qualify as a political society under contemporary (i.e., European) legal standards, so they possessed no sovereignty over the area. Even under the modern test announced in *Reparations for Injuries Suffered in the Service of the United Nations*,¹⁰⁴¹ the Toubous did not constitute a sovereign entity. The anarchic Toubou society prevented any true obligations from arising between the clan chiefs and the members, and the chiefs could not compel the members to obey them.

1041. *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 178 (Apr. 11).

Nor did the Sanusi have title to the area; the order failed to display the requisite amount of state authority. And although the Turks may have gained title between 1908 and 1913, they subsequently abandoned the region. France later moved in, permanently occupying the area by 1929.

Libya may have more success arguing that the Aouzou Strip was a Turkish hinterland. Under this theory, Turkey would not need to have displayed the authority necessary to establish authority by occupation, especially if no other power claimed the area. Lesser acts could demonstrate sufficient interest to create a hinterland. But the juridical status of the hinterland was uncertain. Although contemporary jurists generally disdained such theories, state practice and international case law accorded them greater acceptance.

Libya's best argument seeks to have the Turkish and the Sanusi presence evaluated according to standards of sovereignty prevailing among the people of the region. This approach, however, has failed in the past, and it may also fail here. Although it makes sound theoretical sense, the claim presents significant problems of proof. It would require the Court, decades after the fact, to determine the subjective beliefs of persons who did not leave written records. The argument also departs from customary legal practice. It essentially eviscerates the effective occupation requirement, since it requires only a minimal display of sovereignty to establish ties, as long as the claimant can prove that the level of activity suited the local conditions. Instead of settling the law, a ruling that favors this approach would create enormous uncertainty.

Yet even if the Court accepts an alternative notion of sovereignty, Libya still may not prevail. The inability of the Aouzou Strip's inhabitants, the Toubous, to establish *any* sovereign control in the central Sahara cuts against Libya's position. Toubou society prevented the concentration of authority to bind individuals and families in any manner. If no Toubou chief could command the obedience of clan members, then surely no outside power could win their obedience by merely concluding an agreement with a chief. Definitive acquisition of sovereignty over the Toubous could arise only from territorial occupation. France achieved this, and Turkey did not. France thus obtained legal title to the Aouzou Strip, and Chad as its successor inherited that title.